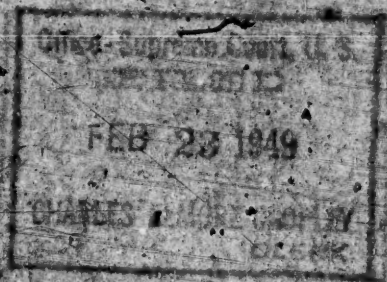




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SUPREME COURT, U.S.



No. 330

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*In the Supreme Court of the United States*

OCTOBER TERM, 1948

UNITED STATES OF AMERICA, APPELLANT

v.

THE INTERSTATE COMMERCE COMMISSION, UNITED  
STATES OF AMERICA, THE PENNSYLVANIA RAIL-  
ROAD COMPANY, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR  
THE DISTRICT OF COLUMBIA

BRIEF FOR THE UNITED STATES

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APPEAL FROM THE UNITED STATES DISTRICT COURT FOR  
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OPINIONS BELOW

The specially constituted district court's opinion (R. 129) appears at 78 F. Supp. 580. The report of the Interstate Commerce Commission (R. 101) appears at 269 I. C. C. 141.

JURISDICTION

The final judgment of the district court was entered on July 26, 1948. (R. 134). The petition for appeal was filed and allowed on August 25, 1948 (R. 135, 136). The jurisdiction of this

Court to review by direct appeal the judgment entered in this case is conferred by 28 U. S. C. (revised) 1253. See also 28 U. S. C. (revised) 1336, 2101. Probable jurisdiction was noted by this Court on November 8, 1948 (R. 652).

#### STATUTES INVOLVED

The relevant provisions of Part I of the Interstate Commerce Act and of the Judicial Code, as amended by the Urgent Deficiencies Act<sup>1</sup> are set forth in the Appendix, *infra*, pp. 103-114.

#### QUESTIONS PRESENTED

1. Whether the statute authorizing judicial review of orders of the Interstate Commerce Commission withholds such right of review from the United States, as a shipper.
2. Whether this action by the United States presents a justiciable case or controversy.
3. Whether an order of the Commission dismissing a complaint seeking an award of damages sustained by a complainant by reason of carrier rates, charges, or practices alleged to have been

<sup>1</sup> The pertinent provisions of the Urgent Deficiencies Act were incorporated into Title 28, United States Code, by Public Law 773, 80th Congress, approved June 25, 1948 (28 U. S. C. (revised) 1253, 1336, 2101, 2284, 2321-2325). Unless otherwise noted, references to 28 U. S. C. — refer to that title as it stood before its revision by Public Law 773.

in violation of the Interstate Commerce Act, is an order of a kind which is reviewable under Section 208 of the Judicial Code (28 U. S. C. 46).

4. Whether the Commission's order dismissing the complaint of the United States is vitiated by errors of law or lack of a rational basis.

#### STATEMENT

Export traffic is ordinarily delivered to water carriers in order to reach its ultimate destination overseas. In order to accomplish such interchange of traffic, piers or wharves, usually are utilized so that railroad cars may be moved to points on the piers adjacent to ships, where the traffic can be removed from the railroad cars and be placed within reach of ships' tackle (R. 74, 78).

For many years the railroads serving the port of Norfolk, Virginia, have provided, as a part of the service covered by their rates applicable to export traffic, the piers needed at Norfolk to accomplish this interchange of export traffic between railroad cars and ships, which is commonly known as wharfage; and they have also provided the labor and other services needed to unload export traffic from railroad cars and place it within reach of ships' tackle, which are known in transportation parlance as handling services<sup>2</sup> (R. 74).

<sup>2</sup> Wharfage and handling services also were provided by the railroads on import, coastwise, and intercoastal traffic which moved through the port of Norfolk.

Among other piers used by the railroads at Norfolk were the facilities known as Army Base Piers 1 and 2 (R. 76). These facilities were constructed by the Government during the first World War and, after the conclusion of hostilities, the piers were leased to the City of Norfolk (R. 76). Subsequently these piers were leased successively to Norfolk Tidewater Terminal, Inc., and Transport Trading and Terminal Corporation, private corporations, and the latter company continued in possession of the piers until on or about June 15, 1942 (R. 76).

In 1925, the Pennsylvania Railroad Company, having no pier facility in Norfolk and desiring to provide service for shippers and to secure an agent for solicitation of water-borne traffic over its lines, entered into a contract with Norfolk Tidewater Terminal, Inc., then operating the Army Base piers as public pier facilities, to act as such agent (R. 75). The stipulated compensation to it for such service, which was designated as compensation for wharfage, was 20 cents per ton of freight moving over the piers (R. 75). The Pennsylvania also employed Norfolk Tidewater Terminal, Inc., to unload freight from railroad cars for compensation of 60 cents per ton (R. 75). Subsequently, Official Territory railroads serving the port of Norfolk, except the Chesapeake & Ohio Railroad Company, made similar arrangements with Norfolk Tidewater

Terminal, Inc., or subsequent lessees of the Army Base piers.

The Official Territory railroads provided in their tariffs that their rates to Norfolk included the charges at certain piers for wharfage and handling services, not to exceed 20 cents per ton for wharfage and 60 cents per ton for handling services (R. 75). The names of the pier facilities, at which wharfage and handling service charges would be included in the rates of the Official Territory railroads, were set forth in the tariffs of the Norfolk and Portsmouth Belt Line Railroad Company, which was owned equally by eight line-haul railroads serving the port of Norfolk (R. 75). The facilities of the Transport Trading and Terminal Corporation, lessee and operator of the Army Base piers, were so named in those tariffs (R. 429).

The other railroads serving Norfolk provided in their tariffs that they would absorb charges for wharfage and handling services at Norfolk from their rates, not to exceed 20 cents per ton for wharfage and 60 cents per ton for handling services, or provide wharfage and handling services at no additional expense to a shipper (R. 75).

With the rapid increase in volume of its export traffic moving to support military and naval forces overseas in 1942, the United States became the principal shipper over the Army Base piers (R. 76). Owing to war conditions, the Govern-

ment deemed it necessary to assume control of the piers in order to expedite the movement of military freight, almost entirely outbound (R. 88). Accordingly, the Government cancelled its lease of the Army Base piers to Transport Trading and Terminal Corporation and took possession of the piers on or about June 15, 1942 (R. 88).

Notwithstanding this change in control, the railroads continued to provide in their tariffs that they would absorb the charges for wharfage and handling services at the specified pier facilities from their rates or that those facilities and services would be included in those rates (R. 84). The Government, through its War Department, requested the railroads to make it an allowance, as a shipper, for the expense incurred after June 15, 1942, in providing the piers and handling services on its traffic moving over the Army Base piers (R. 80). The railroads refused to make any such allowance (R. 80). Thereafter, on May 22, 1943, the Government requested the railroads to perform the handling services on traffic moving over the Army Base piers where the rates included such services (R. 80). This request also was refused by the railroads (R. 80).

On April 15, 1944, the United States filed a complaint against the railroads with the Interstate Commerce Commission, charging that the railroads, by reason of their refusal to make an allowance for wharfage and handling services on traffic moving over the Army Base piers or to

perform the handling services themselves on such traffic, on and after June 15, 1942, had subjected the Government to the payment of rates and charges which were, when exacted, unjust and unreasonable, in violation of Section 1 (5) (a) and Section 1 (6) of the Interstate Commerce Act (49 U. S. C. 1); unjustly discriminatory, in violation of Section 2 of the Act (49 U. S. C. 2); unduly prejudicial to military traffic and not in full compliance with Section 6 (8) of the Act (49 U. S. C. 6); and excessive and without any allowance to the owner for the use of its instrumentalities in transportation and for its rendition of services connected with transportation, in violation of Section 15 (13) of the Act (49 U. S. C. 15) (R. 150). In its complaint, the United States sought an award for the damages which it had sustained as the result of the alleged violations of the Act.<sup>3</sup>

After a hearing on the Government's complaint, Division 2 of the Commission (with Commissioner Barnard dissenting), on August 3, 1945, found that the railroads had violated the Interstate Commerce Act in certain respects and that the Government had been damaged thereby in the

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<sup>3</sup> The Government's complaint also sought relief for the future but during the litigation before the Commission, on or about July 3, 1946, the Army Base piers reverted to operation similar to that in effect prior to June 15, 1942, so that the complaint, when dismissed on July 25, 1947, involved only the claim for damages (R. 610).

sum of 4 cents per hundred pounds, with interest, on its traffic which had moved over the Army Base piers on and after June 15, 1942. *United States of America v. Aberdeen & Rockfish Railroad Company, et al.*, 263 I. C. C. 303. The Commission (with Commissioners Aitchison, Splawn, Alldredge and Rogers dissenting) reversed Division 2 on May 3, 1946. *United States of America v. Aberdeen & Rockfish Railroad Company, et al.*, 264 I. C. C. 683. Upon reargument, the Commission (with Commissioners Splawn, Johnson, Rogers, Alldredge and Aitchison dissenting), on July 25, 1947, affirmed its prior decision and entered an order dismissing the Government's complaint. *United States of America v. Aberdeen & Rockfish Railroad Company, et al.*, 269 I. C. C. 141.

This action was brought by the United States under the Urgent Deficiencies Act to set aside the Commission's order dismissing the Government's complaint (R. 66-72). The petition filed by the Government named as defendants the Interstate Commerce Commission and the United States\* (R. 66). The Commission, in its answer, alleged that the district court lacked jurisdiction over the cause upon the ground that Section 9 of

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\* The United States was named as a defendant because of the statutory requirement (28 U. S. C. 46) that a suit of this kind be brought against the United States. In its capacity as a statutory defendant, the United States filed a neutral answer (R. 118-119).

the Interstate Commerce Act (49 U. S. C. 9) gave the petitioner an election to file a complaint with the Commission or to bring suit against the railroads in a federal district court, and estopped petitioner, after it had elected to pursue the former remedy, from securing judicial review of the order entered by the Commission in the complaint proceeding (R. 115). The Commission also pleaded, as an alternative defense, that its order of dismissal was valid (R. 115-118).

The Pennsylvania Railroad Company, The Virginian Railway Company, Southern Railway Company, Atlantic Coast Line Railway Company, Seaboard Air Line Railroad Company, and Norfolk Southern Railway Company intervened as defendants pursuant to their statutory right to do so (28 U. S. C. 45a) (R. 119). The railroads' answer denied that the district court had jurisdiction over the cause and, in the alternative, asserted that the Commission's order was in all respects valid (R. 125-127). The grounds given for the court's alleged lack of jurisdiction were: (a) that there was no case or controversy since the United States was both

<sup>5</sup> The Norfolk and Western Railway Company was one of the principal defendant's named in the Government's complaint filed with the Commission. However, on December 28, 1945, that railroad made a compromise settlement of the complaint, under which the Government received approximately \$865,000.00 (R. 561-562, 604). Accordingly, the Norfolk and Western did not intervene in the proceeding before the district court.

plaintiff and defendant in the action; (b) that the statute providing for suits to set aside orders of the Interstate Commerce Commission does not authorize the United States to institute such a suit; and (c) that such statute does not authorize a suit to set aside an order of the Commission which denies reparation for alleged prior violations of the Interstate Commerce Act (R. 123-124).

The cause was heard on May 5, 1948 (R. 1). The statutory three-judge district court filed its opinion on June 28, 1948 (R. 129). The district court held that Congress, when it enacted the statute governing suits to set aside orders of the Commission, did not intend to permit the United States to bring such a suit. The court, having determined that the statute does not authorize maintenance of the present action, did not reach the merits of the case. Nor did the court rule on the defense contention that the statute authorizing review of orders of the Commission does not comprehend an order of the type here involved.

The district court entered its judgment dismissing the action on July 26, 1948 (R. 134). The appeal therefrom was allowed on August 25, 1948 (R. 136), and on November 8, 1948, this Court noted probable jurisdiction (R. 652).

#### SUMMARY OF ARGUMENT

##### I

A. The jurisdictional provisions here involved place no limitation on the right of any party to

bring actions to set aside the Commission's orders and there is no basis for the conclusion that Congress intended that the United States should not be permitted to invoke judicial review. It is not to be assumed that Congress intended to withhold from the United States, where its pecuniary interests are directly involved, the same right of review which has been conferred on private parties. Not only has the United States as a defendant aligned itself on the side of plaintiffs, including the Secretary of Agriculture and the Inland Waterways Corporation, attacking the validity of the Commission's orders in a number of cases, without question or criticism by this Court, but also rights of the United States have been successfully asserted through its instrumentalities in suits to set aside the Commission's orders. Accordingly, it would seem that the United States may attack the Commission's order in its own name.

B. The mere circumstance that the United States is formally both plaintiff and a defendant does not make moot the controversy presented in this cause. *Interstate Commerce Commission v. Inland Waterways Corp.*, 319 U. S. 671; *Interstate Commerce Commission v. Mechling*, 330 U. S. 567. For purposes of determining whether a constitutional "case or controversy" exists, substance, not form, is controlling. Where the Commission and parties affected by the Commission's orders are defendants in suits brought under the Urgent

Deficiencies Act, the fact that the United States, in asserting the invalidity of the Commission's orders, is required to name the United States as a party defendant does not provide any basis for holding that the controversy is moot, for the statute provides that the Commission and the other parties are authorized to carry on the litigation to a conclusion without regard to the action or non-action of the Attorney General. The asserted rule that the United States may not sue itself, relied upon by the district court, has no application in the circumstances of this case.

C. The Commission's order here involved is subject to review under the test established in *Rochester Telephone Corp. v. United States*, 307 U. S. 125, and *El Dorado Oil Works v. United States*, 328 U. S. 12. The Commission had the initial and exclusive jurisdiction to hear and determine the Government's complaint, and legal consequences will flow from the Commission's order dismissing that complaint, since the order, if not set aside, will finally fix the right asserted by the United States. Decisions resting a denial of judicial review of the Commission's orders of the type here involved on the negative order doctrine, or an asserted election of remedies under Section 9 of the Interstate Commerce Act, or the alleged private character of reparation orders, or the theory that the Commission's exercise of discretion in reparation cases is not subject to review, are inconsistent

in principle and irreconcilable with the *El Dorado* case, *supra*.

## II.

Where a shipper provides a transportation facility or performs a transportation service, included in the common carrier obligation, the shipper ordinarily is entitled to receive a just and reasonable allowance from the carrier under Section 15 (13) of the Interstate Commerce Act (49 U. S. C. 15).

Furnishing wharfage and handling services on export traffic is transportation included in the common carrier obligation which carriers are under a legal duty to provide, and the Commission's conclusion to the contrary is erroneous as a matter of law and vitiates its order. The railroads' tariffs held the railroads out to provide wharfage and handling services at the Government's Army Base piers, and the Commission's conclusion that the provisions of the tariffs became meaningless after June 15, 1942, was clearly erroneous as a matter of law.

The Commission's conclusions which it believed excused the railroads from performing their common carrier obligation of providing wharfage and handling services at the Army Base piers or making an allowance in lieu thereof, lack any rational basis. Nor is there any rational basis for the Commission's conclusions that the failure and re-

fusal to provide wharfage and handling services or to make an allowance therefor (1) was not unjustly discriminatory and (2) did not result in unreasonable rates and charges on the Government's traffic.

## ARGUMENT

### I

#### THE DISTRICT COURT HAD JURISDICTION OF THE CAUSE

##### A. THE UNITED STATES MAY INVOKE THE URGENT DEFICIENCIES ACT

The Urgent Deficiencies Act confers upon the district courts original jurisdiction "of cases brought to enjoin, set aside, annul, or suspend in whole or in part any order of the Interstate Commerce Commission." 28 U. S. C. 41 (28). That Act further provides that "The jurisdiction of the district courts \* \* \* shall be invoked by filing \* \* \* a written petition setting forth briefly and succinctly the facts constituting the petitioner's cause of action, and specifying the

\* This provision first appeared in the Mann-Elkins Act of June 18, 1910 (36 Stat. 539), whereby Congress established the Commerce Court and delineated its jurisdiction. By the terms of the Urgent Deficiencies Act of October 22, 1913 (38 Stat. 208, 219), the Commerce Court was abolished and its jurisdiction was transferred to the district courts without any other substantial change. See *Standard Oil Co. v. United States*, 283 U. S. 235, 236-238.

relief sought." 28 U. S. C. 45. Section 17 (9) of the Interstate Commerce Act provides, without any limitation on the right of any party, that "any decision, order, or requirement" of the Commission may be reviewed by the courts (49 U. S. C. 17 (9)). Thus the jurisdictional statutes here involved place no limitation, in terms, on the right of any party to bring and maintain actions to set aside the Commission's orders.

Not only does the absence of any such limitation support the right of the United States to bring and maintain this action, but also its right to invoke the jurisdictional statutes here involved is supported by the rule that statutes should not be interpreted in derogation of the rights of the United States unless Congress clearly and affirmatively, in express terms, has imposed a limitation upon such rights. *United States v. United Mine Workers*, 330 U. S. 258, 272.

The district court's interpretation of the Urgent Deficiencies Act, that it does not authorize actions by the United States to set aside the Commission's orders, applies not only to orders involving past rates but also to orders involving future rates. It is well established that private shippers are authorized to attack orders involving future rates. *New York v. United States*, 331 U. S. 284. The United States, if not the largest, is one of the largest shippers utilizing railroad

freight and passenger service. In the absence of language clearly imposing a limitation upon the right of the United States to seek judicial review of the Commission's orders, it is not to be assumed that Congress intended to withhold from the United States, where its own pecuniary interests are directly and substantially involved, the right of review which has been conferred upon private parties. Cf. *Stark v. Wickard*, 321 U. S. 288, 309.

This case is not governed by *United States v. Cooper Corp.*, 312 U. S. 600, where it was held that the term "any person" does not include the United States so as to give it a right to treble damages under Section 7 of the Sherman Act. Indeed, the criteria of statutory construction relied upon by the Court and the dissenting justices in the *Cooper* case confirm the right of the United States to maintain this action. Here the jurisdictional statute is not limited to "any person;" the scheme and structure of the Urgent Deficiencies Act and its amendments evidence an intent to confer jurisdiction on the courts in all cases; and the legislative history does not show that Congress intended to withhold from the United States the right to judicial review conferred on all other shippers. Until *Rochester Telephone Corp. v. United States*, 307 U. S. 125, not only the United States but also all other shippers were foreclosed by the negative order doctrine from invoking the Urgent Deficiencies Act to

review orders of the Commission denying reparations, so that the failure of the United States to invoke the Act heretofore has no significance.

There is no justification here, as was assumed in the *Cooper* case by the majority of the Court, for an interpretation of the jurisdictional provisions which would preclude the United States from invoking those provisions upon the ground that other direct remedies are available to the Government. Under the primary jurisdiction doctrine, the Commission had the initial and exclusive jurisdiction to hear and determine the Government's complaint for damages for violation of the Interstate Commerce Act, and, accordingly, other remedies were not available to the United States. *Texas & Pacific Railway Company v. Abilene Cotton Oil Co.*, 204 U. S. 426; *Armour & Co. v. Alton R. Co.*, 312 U. S. 195. The United States could not have protected itself by invoking criminal or equitable proceedings against the carriers in the absence of the indispensable administrative determination of the question whether the assailed rates and charges were unjust, unreasonable, discriminatory or otherwise unlawful. And where the United States has attempted to exercise the right of seizure without obtaining the indispensable administrative determination, the courts have required the Government to make restitution. *Atchison, Topeka & Santa Fe Railway Company v. United States*, 256 U. S. 205; *Missouri Pacific*

*Railroad Co. v. United States*, 71 C. Cls. 650, 662;  
*Southern Pacific Co. v. United States*, 53 C. Cls.

332. In sum, there is nothing here that precludes application of the well established general rule, cogently stated by Mr. Justice Black in his dissenting opinion in the *Cooper* case (p. 620), that "the United States can exercise all of the legal remedies which other persons, bodies or associations can exercise, both at common law and under statutes, unless there is something in a statute or in its history to indicate an intent to deprive the United States of that right." And the majority of the Court in the *Cooper* case did not reject this proposition; they held only that the terms and history of the Sherman Act evidenced a purpose to withhold from the United States the additional remedy of an action for treble damages under Section 7. As we show, however, the terms and history of the Urgent Deficiencies Act do not indicate a purpose to deprive the United States of the right to seek review of Commission orders, in circumstances where that right is available to all other shippers.

In the present case, the district court, not relying on an express limitation upon the right of the United States to seek judicial review, held that Congress clearly intended not to permit a suit by the United States of America against the United States of America, to review an order of the Interstate Commerce Commission (R. 134). If

that intention is not to be found in the words of the statute, it must be found, if at all, in its legislative history. But there is nothing in the legislative history of the Mann-Elkins Act which indicates that the jurisdictional statutes here involved are to be construed differently, simply because the aggrieved shipper happens to be the United States. In fact, some members of Congress recognized, while the legislation was being debated, that the rights of the United States might be adversely affected by the Commission's orders, and that the proposed jurisdictional statute, later enacted into law as the Mann-Elkins Act, would authorize suits by the United States to set aside the Commission's orders.

Thus, Mr. Norris, Representative from Nebraska, in opposing an amendment to the proposed legislation which would have required the Attorney General to defend the Commission's orders in all cases, participated in the following colloquy (45 Cong. Rec. 5526):

"MR. NORRIS. \* \* \* Mr. Chairman, I think, \* \* \* it might be possible, if this amendment were adopted, the Attorney-General would be put in very embarrassing position. \* \* \*

\* \* \* I submit that that kind of a condition might happen hundreds of times. It is not an impossibility, or even a remote condition, where the Attorney-General, under the specific statement of this law [proposed amendment], would have to defend the order of the commission, when, as a matter of fact, the Government of the United States would be trying to reverse that order.

"MR. ADAMSON. Will the gentleman from Nebraska permit me to suggest that there is no provision for carrying

Moreover, even if Congress had failed to anticipate and provide for this particular problem, such a failure does not justify an interpretation which limits application of the broad terms of a legislative enactment, such as that here involved, so as to deny to the United States, in its capacity as a shipper, the substantial rights which Congress granted to all other shippers. Cf. *United States v. South-Eastern Underwriters Association*, 322 U. S. 533, 556-557.

up cases for what the commission refuses to do? It is only the things that the commission does that we provide for attacking.

“Mr. NORRIS. Suppose the commission, as a matter of fact, makes an order, and that order is against the shipper. Suppose the Government of the United States has been ruled against by the commission.

“Mr. ADAMSON. There is no provision to deal with that.

“Mr. NORRIS. There is certainly a provision in this bill that gives the commission the right and the authority to make various kinds of orders.

“Mr. ADAMSON. It is what the commission does that is to be attacked, not what it does not do.

“Mr. NORRIS. The Attorney-General would be representing the Government. If the commission rules against the Government, then you would put the Attorney-General on both sides of the case.

“Mr. ADAMSON. You may attack what the commission does, but suppose it refuses to do anything.

“Mr. NORRIS. Suppose the Government wants to attack what the commission has done. Then where is the Attorney-General going to get off or on?”

Following this discussion, the proposed amendment, to require the Attorney General to defend the Commission's orders in all cases, was defeated (45 Cong. Rec. 5527).

In the Senate debate, Senator Heyburn insisted that the

The circumstance that the Act authorizes the Attorney General to represent the United States in suits brought to set aside the Commission's orders does not justify an interpretation denying the United States the right to invoke the jurisdictional statute. The statute expressly provides (28 U. S. C. 45a) that the Interstate Commerce Commission and any party or parties in interest to proceedings before the Commission may appear

United States could, under the proposed bill, bring an action to set aside an order of the Commission. In discussing the jurisdiction of the Commerce Court to set aside such orders, (item two of the enumeration of the Court's jurisdiction), Senator Heyburn said (45 Cong. Rec. 6339):

"\* \* \* But there is an original right in this court under which a litigant may bring suit to enjoin, set aside, annul, or suspend, in whole or in part, any order of the Interstate Commerce Commission. That is the suit contemplated by the later provision, providing that the Attorney-General may bring suit."

Also, it was specifically pointed out in the Senate that no limitation whatever had been placed by Congress upon the parties who would be authorized to bring actions to set aside orders of the Commission. Thus, Senator Heyburn said (45 Cong. Rec. 6340):

"A proceeding for an injunction is so well understood and so well defined in law and in practice that it requires no argument any more than the mere statement of the proposition that if a party (and it does not limit the parties or specify them) may bring a suit in this court for the purpose of enjoining them \* \* \* it must be in the ordinary proceeding in equity."

Thus, it is clear that Congress was informed that no limitation had been adopted to preclude judicial review on the request of any interested party, and also that the United States, in certain cases, could be an interested party seeking to enjoin or set aside an order of the Commission.

in cases brought to set aside the Commission's orders, and be represented by their own counsel, and that the Attorney General shall not dispose of or discontinue such suits over the objection of any such party, and that such parties may defend and continue such proceedings unaffected by the action or non-action of the Attorney General. Here the Commission was made a party defendant to the action and the railroads intervened as defendants, as they were authorized to do by law, and both the Commission and the railroads defended the Commission's order. This Court has held in analogous cases that the fact that the Attorney General is authorized to represent the United States in such cases does not confer on him the power to control the litigation at any stage over the objection of the other parties, and that any aggrieved party may obtain the same relief which the United States may secure where it defends the action. *Interstate Commerce Commission v. Oregon-Washington R. & N. Co.*, 288 U. S. 14, 25-26. See also, *Mitchell v. United States*, 313 U. S. 80; *McLean Trucking Co. v. United States*, 321 U. S. 67; *Interstate Commerce Commission v. Columbus & G. Ry. Co.*, 319 U. S. 551; *Interstate Commerce Commission v. Inland Waterways Corp.*, 319 U. S. 671; *Interstate Commerce Commission v. Jersey City*, 322 U. S. 503; *North Carolina v. United States*, 325 U. S. 507; *Alabama v. United States*, 325 U. S. 535; *American Trucking Associations, Inc. v. United States*,

326 U. S. 77; *Henderson v. United States*, 63 F. Supp. 906 (D. Md.); *Interstate Commerce Commission v. Meckling*, 330 U. S. 567. Accordingly, the Attorney General's authority to defend the Commission's orders provides no basis for denying to the United States the right to attack such orders where it is adversely affected thereby.

As has been noted (*supra*, note 7, pp. 19-21), a proposal before Congress to require the Attorney General to defend the Commission's orders in all cases was defeated after certain Senators and Representatives had pointed out that the United States might wish to attack an order of the Commission. The statements made by certain Senators during the debate on the Mann-Elkins Act (45 Cong. Rec. 4104, 5525, 6457), relied upon by the district court as support for its subsidiary conclusion that it was the intention of the authors of the legislation that the Attorney General should appear and defend the action of the Commission in all cases (R. 131-132), and the court's ultimate conclusion predicated thereon, that Congress did not contemplate or intend to authorize a suit by the United States to review an order of the Commission, do not in fact support the construction made by the court below. The proposal before Congress, advocated by the Senators who made those statements, was to lodge in the Attorney General exclusively the power to defend orders of the Commission, and to exclude the Com-

mission and shippers from appearing in such cases and urging their views as to the validity of the Commission's orders. The statements of the Senators, relied upon by the district court, were made in response to suggestions that the Attorney General might not always find it expedient to defend the Commission's orders, and thus subvert the efforts of the Commission to carry out the purpose of the Interstate Commerce Act. The proposal advocated by those Senators did not prevail, but, on the contrary, Congress "made it plain and clear that the right of the shipper and the right of the Interstate Commerce Commission [to defend the Commission's orders] should be coequal with that of the Government"<sup>s</sup> (45 Cong. Rec. 7367). Accordingly, the Senators' state-

<sup>s</sup> The district court treated the statements made by those Senators as adequate support for its conclusion that the United States is not a mere nominal party defendant. In reviewing the legislative history, the court apparently considered insignificant the many statements made by members of Congress that the United States, in fact, would be only a nominal party defendant (45 Cong. Rec. 5159, 5235, 5430, 3539, 6393, 6447, 6452). It should be noted that, while the United States normally defends actions brought to set aside the Commission's orders, it is not required or expected to defend, in every case, and it would seem that the legislative history and contemporary and long-standing construction of the jurisdictional provisions (*infra*, pp. 25-31) justify the view that Congress has not made the position of the United States as a defendant so paramount as to manifest an intention on the part of Congress to deny to the United States, as a shipper, the right of review available to other shippers.

ments do not, as the district court believed, evidence an intention to ~~withhold~~ from the United States the right to invoke the proposed jurisdictional statute; on the contrary, rejection of the legislation as proposed tends to support the opposite conclusion.

Moreover, actual experience shows that the Attorney General has opposed the Commission in cases instituted under the Urgent Deficiencies Act, thus negating the conclusion of the district court that Congress, by providing that the Attorney General is authorized to defend suits to set aside orders of the Commission, did not contemplate or intend to authorize a suit by the United States to set aside such orders. It is significant that in a number of cases brought under the Urgent Deficiencies Act, the Attorney General has aligned himself on the side of the plaintiff attacking the validity of orders of the Commission and has appeared in opposition to the Commission, and this action has neither been questioned nor criticized by this Court. See *Mitchell v. United States*, 313 U. S. 80; *McLean Trucking Company v. United States*, 321 U. S. 67; *Interstate Commerce Commission v. Mechling*, 330 U. S. 567. In the *Mechling* case the United States, represented by the Attorney General, was accorded the right to be treated as an appellee over the objections of the Commission (330 U. S. 574), and the United States aligned

itself with the Secretary of Agriculture and the Inland Waterways Corporation, plaintiffs in the district court, and actively opposed the Commission before this Court (330 U. S. 569).

Implicit judicial recognition thus appears to have been given to the fact that necessarily some determinations made by the Commission, an independent governmental agency, will be regarded as erroneous by the highest legal officers of the Government and that, where this is so and where the interests of the Government are adversely affected, those officers may stand before the courts in opposition to the Commission. There may be a difference of form, but certainly there is none of substance, between the cases where the United States, although formally a party defendant, has appeared on behalf of a party plaintiff, and this case, where it is, *eo nomine*, both plaintiff and a defendant.

The fact that the United States must be named a party defendant in suits to set aside the Commission's orders likewise provides no basis for denying the United States the right to invoke the jurisdictional statutes, especially where, as here, the Commission is made a party defendant. This Court held in *Texas v. Interstate Commerce Commission*, 258 U. S. 158, 165, "that suits to set aside, annul or suspend the Commission's orders should be brought in the District Courts where all proper parties, including

the United States, may be made defendants and accorded an appropriate hearing." In *Cargill, Inc. v. United States*, 44 F. Supp. 368 (N. D. Ill.) (later reversed on the merits in *Interstate Commerce Commission v. Inland Waterways Corp.*, 319 U. S. 671), the district court specifically held (p. 375) that "The carrier defendants were properly joined in these suits and the Court has jurisdiction over said carrier defendants." The statute here involved provides, with respect to applications for preliminary injunctions, for notice to the Commission and "to such other persons as may be defendants in the suit." 28 U. S. C. 47. Thus, the Commission and other persons affected by the Commission's orders not only may intervene but they also may be made parties defendant in suits to set aside the Commission's orders. As heretofore noted, the Commission and other persons properly defendants in such proceedings may defend and continue such suits unaffected by the action or non-action of the Attorney General, representing the United States as a defendant. Accordingly, the fact that Congress assigned to the United States the role of defendant in suits to set aside the Commission's orders can not be construed as evidencing an intention to withhold from the United States the right to maintain such suits where its rights as a shipper are adversely affected by the Commission's orders.

The suggestion that the presence of the Commission and the railroads as defendants in this controversy is not sufficient to sustain the right of the United States to maintain this action is without merit, since it is predicated upon the erroneous assumption that relief in the proceeding can be granted only against the United States. In *Rochester Telephone Corp. v. United States*, 307 U. S. 125, this Court clearly described the character of relief appropriate in suits brought under the Urgent Deficiencies Act and designated the party against whom the relief is directed (p. 136):

Clearly Procter & Gamble was authorized under § 13 of the Act to Regulate Commerce to institute the proceedings before the Commission. Since it asserted a legal right under that Act to have the Commission apply different principles of law from those which led the Commission to dismiss the complaint, the ingredients for an adjudication—constituting a case or controversy—were present. \* \* \* Judicial relief would be precisely the same as in the recognized instances of review by courts of Commission action: if the legal principles on which the Commission acted were not erroneous, the bill would be ordered dismissed; if the Commission was found to have proceeded on erroneous legal principles, the Commission would be ordered to proceed within the framework of

its own discretionary authority on the indicated correct principles.

The so-called rule that a person may not sue himself, relied upon by the district court as support for its conclusion that Congress did not contemplate or intend to authorize a suit by the United States to set aside the Commission's orders (R. 132), has no application here. Where, as here, there is involved a jurisdictional statute providing that, in suits to set aside orders of the Interstate Commerce Commission, the United States shall be named as a party defendant, and where the actual controversy is between the United States, as a shipper, and the railroads, contesting an order of the Commission, and all parties affected by the order are properly before the court, and the Commission and the railroads are authorized to carry on the litigation to a conclusion, unaffected by either the action or non-action of the United States as a defendant, surely it would be absurd to apply the alleged rule that the United States may not sue itself. The matter is a practical one, which should be governed by realities and not by technicalities or legal fictions. And the practical fact here is that the United States is the plaintiff, and in no real sense a defendant. The ultimate question here is one of statutory construction, and there is nothing in the statute, either explicitly or implicitly, which denies to the United States the right to obtain re-

view of adverse orders of the Interstate Commerce Commission.

The right of the United States to maintain this action also is sustained by *Interstate Commerce Commission v. Inland Waterways Corp.*, 319 U. S. 671, and *Interstate Commerce Commission v. Mechling*, 330 U. S. 567. In the former case the Inland Waterways Corporation, an instrumentality of the United States,<sup>9</sup> brought suit against the United States under the Urgent Deficiencies Act to set aside an order of the Commission, and the action was heard and determined on its merits. In the *Mechling* case, the Inland Waterways Corporation, the Secretary of Agriculture, and a non-government water barge carrier brought separate suits (later consolidated) under the Urgent Deficiencies Act, and the suits were heard and determined on their merits. As the Inland Waterways Corporation was asserting rights of the United States as a water carrier in both cases, it seems clear that the United States was the real party plaintiff in both proceedings.<sup>10</sup> *Defense Supplies Corp. v. United States Lines Co.*, 148 F. 2d 311 (C. A. 2), certiorari denied, 326 U. S. 746.

As this Court appears to have recognized the

<sup>9</sup> 49 U. S. C. 151, *et seq.*

<sup>10</sup> The Inland Waterways Corporation, Defense Supplies Corporation, and others, are classified as "wholly owned Government corporations" for budgetary purposes. Government Corporation Control Act, 59 Stat. 597, 31 U. S. C. 846.

right of the United States as a defendant to take a position adverse to an order of the Commission on behalf of not only private parties but also the Secretary of Agriculture and the Inland Waterways Corporation, and as rights of the United States have been successfully asserted through its instrumentalities under the Urgent Deficiencies Act, the United States clearly has the right to oppose the Commission in its own name. And the right of the United States to attack an order of a governmental commission has been upheld in a similar case. *United States v. Public Utilities Commission of the District of Columbia*, 151 F. 2d 609, 610 (C. A. D. C.), certiorari denied, 331 U. S. 816.

#### B. THERE IS A JUSTICIABLE CASE OR CONTROVERSY

The court below considered that the principle that no person may sue himself was applicable to the United States and dispositive of the present case. It thought that this principle was but an application of the general doctrine that federal courts may deal only with actual cases and controversies, and that "naturally there cannot be a controversy if the same party is both plaintiff and defendant [but] merely a discussion or debate of a moot question" (R. 133). It concluded that, since the United States is both plaintiff and a defendant in this case, there could be no "controversy" and the action could not be maintained.

The prohibition against a person's suing himself is soundly grounded upon the absence of controversy when the same person conducts both prosecution and defense. In some of the cases cited by the court below, an identity of interest on both sides of the supposed controversy obtained either because the plaintiff had purchased the defendant's interest in the subject matter of the litigation or for some similar reason.<sup>11</sup> In other cases cited by the court, the defendant was a nominal plaintiff and an additional plaintiff asserted an interest adverse to the defendant, but decision turned upon application of the well established principle of suretyship that the surety, in paying off a debt, acquires no greater rights than the creditor had. *Globe & Rutgers Fire Ins. Co. v. Hines*, 273 Fed. 774 (C. A. 2), certiorari denied, 257 U. S. 643; *Defense Supplies Corp. v. United States Lines Co.*, 148 F. 2d 311 (C. A. 2), certiorari denied, 326 U. S. 746.<sup>12</sup>

<sup>11</sup> *Lord v. Veazie*, 8 How. 250; *Cleveland v. Chamberlain*, 1 Black 419; *Wood-Paper Co. v. Heft*, 8 Wall. 333.

<sup>12</sup> The *Globe & Rutgers* case held that the insurer of property of Railroad A, operated by the Director General of Railroads, could not recover over against the Director General of Railroads, as operator of Railroad B, in a case where damage to property of Railroad A was caused by the negligent operation of Railroad B. In *Davis, Director General v. Donovan*, 265 U. S. 257, this Court cast doubt upon the validity of the *Globe & Rutgers* case and held that the Director General was to be considered as a separate entity with respect to each railroad property he operated. The court of appeals which decided the *Globe & Rutgers* case sub-

But substance and not form determines whether there is a constitutional case or controversy. *Indianapolis v. Chase National Bank*, 314 U. S. 63. As pointed out in that case, the answer to many problems of law is to be found not in legal learning but in the realities of the record. "Litigation is the pursuit of practical ends, not a game of chess" (314 U. S. 69). In order for there to be a case or controversy within the jurisdiction of the federal courts, it is only necessary that there be "actual controversies \* \* \* between adverse litigants" (*Muskat v. United States*, 219 U. S. 346, 361) or a "real and substantial controversy" between "parties having adverse legal interests" (*Aetna Life Ins. Co. v. Haworth*, 300 U. S. 227, 240-241). Whether the necessary collision of interests exists is not to be determined by mechanical rules, but "must be ascertained from the 'principal purpose of the suit,' *East Tennessee, V. & G. R. v. Grayson*, 119 U. S. 240, 244, and the 'primary and controlling matter in dispute,' *Merchants' Cotton Press Co. v. Insurance Co.*, 151 U. S. 368, 385." (314 U. S. 69.)

sequently refused to follow it. *The Fred B. Dalzell, Jr.*, 1 F. 2d 259, 262 (C. A. 2). In the *Defense Supplies Corporation* case, the holding was that the Defense Supplies Corporation, a tax-free corporate instrumentality of the United States, could not sue the United States for damage to a cargo of wool transported for it by the War Shipping Administration since the Suits in Admiralty Act did not contemplate such an action.

"And so we turn to the actualities of this litigation" (314 U. S. 70). Here there is actual controversy between adverse parties. The United States as plaintiff is suing to enforce a right secured by the Interstate Commerce Act—that shippers are entitled to transportation at just, reasonable, and nondiscriminatory rates and charges.<sup>13</sup> On one side of the case, the United States is asserting the invalidity of an order of the Interstate Commerce Commission; on the other side, the Commission and the intervenor railroads are asserting the validity of the order. On the outcome of this controversy hinges the right of the United States to recover substantial damages from the railroads. There is thus an actual controversy between adversary interests, and no mere moot debate.

The fact that the statute required naming the United States as a defendant does not affect the reality of this controversy. It is settled that the other defendants, the Commission and the railroads, had the right to conduct their defense independently of any action or inaction by the United States in its capacity as a statutory defendant. The Commission may appeal although

<sup>13</sup> The United States' interest as a shipper is such as to give it standing to sue. *United States v. Village of Hubbard*, 266 U. S. 474; *The Chicago Junction Case*, 264 U. S. 258; *Skinner & Eddy Corporation v. United States*, 249 U. S. 551; *Interstate Commerce Commission v. Dissenbaugh*, 222 U. S. 42; *El Dorado Oil Works v. United States*, 328 U. S. 12.

the United States has refused to join in the appeal. *Interstate Commerce Commission v. Oregon-Washington R. & N. Co.*, 288 U. S. 14, 22; *Interstate Commerce Commission v. Columbus & G. Ry. Co.*, 319 U. S. 551. In a number of cases, the United States has filed neutral answers to a complaint brought pursuant to the Urgent Deficiencies Act. *Interstate Commerce Commission v. Inland Waterways Corp.*, 319 U. S. 671; *Interstate Commerce Commission v. Jersey City*, 322 U. S. 503; *North Carolina v. United States*, 325 U. S. 507; *Alabama v. United States*, 325 U. S. 535. In still other proceedings under the Act, the United States has confessed error in the district court, but such confession did not terminate the proceedings or render it moot inasmuch as the Commission (and usually other parties), independently entitled to defend the action, denied error. *McLean Trucking Co. v. United States*, 321 U. S. 67; *American Trucking Associations, Inc. v. United States*, 326 U. S. 77; *Interstate Commerce Commission v. Mechling*, 330 U. S. 567.<sup>14</sup>

<sup>14</sup>In the *American Trucking Ass'ns* case, the Seaboard Railroad in the district court challenged the right of the United States to "be heard in this anomalous role, which virtually amounts to stultification" (*American Trucking Ass'ns v. United States*, 56 F. Supp. 394, 400). The district court said as to this (*ibid.*):

"We hold that the United States cannot confess error so as to make it binding upon us to grant the relief desired by plaintiffs. In *McLean Trucking Co. v. United States*, 321 U. S. 67, 69, 64 S. Ct. 370, error was confessed by the United

This Court has upheld the right of a wholly owned Government corporation to bring suit under the Urgent Deficiencies Act to set aside an order of the Interstate Commerce Commission adversely affecting rights which the corporation asserted in its capacity as an instrumentality of the United States.<sup>15</sup> The fact that in these cases the Court has passed upon the merits of the controversies presented would seem to establish that where, as here, the United States itself is the plaintiff, there is an actual controversy between adverse parties and a "case" or "controversy" which, within the limitations of the Constitution, federal courts have power to adjudicate. *United States v. Public Utilities Commission of the District of Columbia*, 151 F. 2d 609 (C. A. D. C.), certiorari denied, 331 U. S. 816, likewise stands for the proposition that a justiciable case or controversy exists where the United States invokes review proceedings against one of its lesser creatures.

#### C. THE COMMISSION'S ORDER IS SUBJECT TO REVIEW

The United States contends that the Commission's order is subject to review under the

States, yet the Supreme Court affirmed the decree of the three judge District Court, refusing to set aside orders of the Commission. On the other hand, we were glad to consider the brief and oral argument of counsel for the United States".

<sup>15</sup> *Interstate Commerce Commission v. Inland Waterways Corp.*, 319 U. S. 671, and *Interstate Commerce Commission v. Meckling*, 330 U. S. 567, previously discussed (*supra*, p. 30).

"proper application of the combined doctrines of primary jurisdiction and administrative finality," the test established by this Court "as a touchstone of jurisdiction to review the Commission's orders," in *Rochester Telephone Corp. v. United States*, 307 U. S. 125, 142, 143.

Under the primary jurisdiction doctrine, the Commission had the initial and exclusive jurisdiction to hear and determine the Government's complaint for damages resulting from the failure and refusal of the railroads to provide wharfage and handling services or to make an allowance in lieu thereof on its traffic that moved over the Army Base piers at Norfolk. *Texas & Pacific Railway Company v. Abilene Cotton Oil Co.*, 204 U. S. 426; *Great Northern Ry. Co. v. Merchants Elevator Co.*, 259 U. S. 285; *Armour & Co. v. Alton R. Co.*, 312 U. S. 195. The doctrine of administrative finality is fully satisfied here, as "legal consequences" will flow from the Commission's order which, if upheld, will finally fix a "right or obligation." *Rochester Telephone Corp. v. United States*, *supra*, pp. 131-2; *El Dorado Oil Works v. United States*, 328 U. S. 12, 18-19.

The *El Dorado* case, *supra*, firmly establishes the proposition that the district courts possess jurisdiction to review orders of the Commission dismissing complaints attacking past practices and seeking administrative findings with respect

to the unlawfulness of such practices, to be utilized for the recovery of damages. There El Dorado Terminal Co., assignee of El Dorado Oil Works (328 U. S. 16), had commenced an action in the district court to recover upon its contract with the General American Tank Car Corporation certain payments made by the railroads under their tariffs to the Car Corporation as allowances for the use of tank cars it had leased for a stipulated sum per car per month to Oil Works. The Car Corporation defended the action on the ground that payments by it in excess of the stipulated car rental which Oil Works, by the agreement in controversy, had undertaken to pay the Car Corporation for use of the cars, would be unlawful because they would constitute a rebate and, thus, would be contrary to the Interstate Commerce Act. The district court sustained the Car Corporation's defense, which action was reversed by the circuit court of appeals. This Court held that the district court had jurisdiction of the assumpsit action but, before it could proceed, that the Commission should determine whether the "challenged past practices" were lawful and valid, as required by the primary jurisdiction doctrine. *General American Tank Car Corp. v. El Dorado Terminal Co.*, 308 U. S. 422.

In accordance with this Court's decision, El Dorado Terminal Co. and El Dorado Oil Works

instituted a proceeding before the Commission, seeking its administrative determination of the question whether the Car Corporation could make the payments provided for in its contract with Oil Works without violating the Interstate Commerce Act (328 U. S. 17). The Commission found "that a just and reasonable allowance to Oil Works would be the cost incurred by it in furnishing the cars, namely the monthly rental to the Car Company, that any amount in excess of that would be unjust and unreasonable in violation of § 15 (13) and would constitute a rebate and discrimination and involve departure from the tariff rules applicable, prohibited by section 1 of the Elkins Act, and section 6 (7) of the Interstate Commerce Act \* \* \* ." (328 U. S. 17-18.)

Thereafter, El Dorado Oil Works and El Dorado Terminal Co. brought suit in the district court under the Urgent Deficiencies Act, challenging the validity of the Commission's determination. The Commission challenged the jurisdiction of the district court to hear and determine the case, contending that in view of the fact that the Commission's finding affected only the private right of the plaintiffs to obtain damages in their assumpsit action in the district court, which had been stayed pending entry of the finding, the Commission's function was comparable to that exercised by it in reparation cases under Sec-

tion 9 of the Interstate Commerce Act and hence, the determination was not subject to review. In that connection, the Commission and the United States, which had joined the Commission in defense of the action, in a memorandum filed with this Court on February 8, 1946, contended:

Besides maintaining that the Commission's report was fully responsive to the decision of this Court in *General American Tank Car Corp. v. El Dorado Terminal Co.*, 308 U. S. 422, we maintain that its report affects only the private right of appellants to obtain a money judgment in their suit against General American Tank Car Corp., recovery being conditioned, among other things, upon an administrative determination by the Commission under Section 15 (13) of the Interstate Commerce Act. Under this aspect of the case the function of the Commission is comparable to that exercised by it in reparation cases under Section 9. Its findings therein are unsailable in a suit under the Urgent Deficiencies Act (*Ashland Coal & Ice Co. v. United States*, 61 F. Supp. 708 (E. D. Va.), affirmed 325 U. S. 840). \* \* \*

This Court rejected those contentions and reversed the district court, which had dismissed the suit for want of jurisdiction. *El Dorado Oil Works v. United States*, 328 U. S. 12, 18-19. In taking jurisdiction, this Court said, "the Commission's findings and determination if upheld

constitute far more than an 'abstract declaration.' *Rochester Telephone Corp. v. United States*, 307 U. S. 125, 143. 'Legal consequences' (*id.* at 132) would follow which would finally fix a 'right or obligation' (*id.* at 131) on appellants' part." (328 U. S. 18-19.)

There is no substantial difference between the Commission's determination in the *El Dorado* case and its determination in this case. This is shown by this Court's opinion in the *El Dorado* case (328 U. S., at 19-20):

First, it must be noted that the Commission made its determination as to the lawfulness of these past practices on the basis of appellants' own application, asking the Commission to do so. Second, our previous opinion, as well as the Interstate Commerce Act, authorized the Commission to make this determination. The question before us when this case was first here did not relate to future but past allowances. Relying on past decisions, we held that the "reasonableness and legality" of the past dealings here involved were matters which Congress had entrusted to the Commission. See e. g., *Great Northern R. Co. v. Merchants Elevator Co.*, 259 U. S. 285, 291 and other cases cited in our previous opinion.

Thus, although, in the past, the courts have refused to review orders of the Commission involving only past rates and practices, it is now

established that such orders are subject to review under the Urgent Deficiencies Act.

Examination of prior decisions in which the courts have declined to entertain cases brought to review the Commission's orders involving only past rates and practices discloses that those rulings have been predicated, in whole or in part, upon (1) the negative order doctrine, (2) the alternative remedies provided by Section 9 of the Interstate Commerce Act (49 U. S. C. 9), (3) an asserted private character to claims concerning past shipments as distinguished from the quasi-legislative nature of complaints seeking changes in rates and practices for the future, and (4) an alleged discretionary power in the Commission to hear and determine with finality, complaints attacking past rates and practices, not subject to the review available where future rates and practices are determined.

1. *The negative order doctrine.*—The negative order doctrine, initially established in *Procter & Gamble v. United States*, 225 U. S. 282, was held to be no longer controlling "as a touchstone of jurisdiction to review the Commission's orders", in *Rochester Telephone Corp. v. United States*, 307 U. S. 125, 143. However, the influence of the negative order doctrine on other jurisdictional questions which appeared after the *Procter & Gamble* decision makes it desirable to discuss the scope of review available prior to that decision.

Initially, all orders of the Commission were only prima facie evidence as to the facts found to be in support of the orders, and the findings were subject to trial *de novo* in all actions to enforce such orders. *Texas & Pacific Railway Company v. Abilene Cotton Oil Co.*, 204 U. S. 426. The Hepburn Act of 1906, 34 Stat. 584, provided for the enforcement of the Commission's orders, except those for the payment of money, by courts of equity. Enforcement of orders for the payment of money was excepted from the equitable remedy in order to afford trial by jury on the question of damages. The Hepburn Act conferred on courts of equity authority to enjoin, set aside, annul, or suspend, orders of the Commission.

The Mann-Elkins Act of June 18, 1910, 36 Stat. 539, created the Commerce Court and vested in that body exclusive jurisdiction over suits to enjoin or set aside the Commission's orders, suits for the enforcement of those orders except those for the payment of money, suits to prevent unjust discrimination and rebating under the Elkins Act (32 Stat. 847, 49 U. S. C. 41-43), and applications for writs of mandamus to compel carriers to comply with certain provisions of the law. Under the Urgent Deficiencies Act, the jurisdictional statute here involved, the Commerce Court was abolished and its jurisdiction was transferred to the district courts.

Subsequent to the Hepburn Act of 1906 and prior to the Mann-Elkins Act, suits to enjoin and set aside the Commission's orders of dismissal in reparation cases were brought in the circuit courts. See *Twenty-Fourth Annual Report of the Interstate Commerce Commission* (1910), pp. 23-25. After the Commerce Court had been established, those cases were transferred to that tribunal. The Commerce Court ruled that it had jurisdiction of such cases and it decided some of those cases on their merits. *Crane Iron Works v. United States*, 209 Fed. 238; *Russe & Burgess v. Interstate Commerce Commission*, 193 Fed. 678; *Arkansas Fertilizer Co. v. United States*, 193 Fed. 667; *Thompson Lumber Co. v. Interstate Commerce Commission*, 193 Fed. 682;<sup>18</sup> *Procter & Gamble v. United States*, 188 Fed. 221; *Anaconda Copper Mining Co. v. United States* (Com. Ct. June 7, 1912, unreported). Those decisions were vacated by the Commerce Court and many other cases pending before it were dismissed after the decision of this Court in *Procter & Gamble v. United States*, 225 U. S. 282. See *Twenty-Sixth Annual Report of the Interstate Commerce Commission* (1912), p. 34.

<sup>18</sup> During the Congressional debate on the Mann-Elkins Act, the *Thompson Lumber* case and the *Russe & Burgess* case were referred to and it was stated that the Commerce Court would have jurisdiction of these cases under its jurisdiction of suits brought to enjoin, set aside or annul orders of the Commission (45 Cong. Rec. 3342-3344; 5214-5217).

In the *Procter & Gamble* case, *supra*, Procter & Gamble had instituted a proceeding before the Commission against certain railroads to recover reparations on account of demurrage charges which the railroads had collected from Procter & Gamble. The Commission denied reparations. Procter & Gamble then brought suit in the Commerce Court to set aside the Commission's order denying reparations. The Commerce Court held that it possessed the power to set aside the Commission's order and, as a corollary of that power, decided that it had jurisdiction to award reparations for demurrage charges collected by the railroads. However, the Commerce Court sustained the Commission's order of dismissal on its merits. This Court held that the Commerce Court lacked jurisdiction over the Commission's order dismissing Procter & Gamble's complaint because the order was negative, that is, not affirmative in terms (225 U. S. at 293), and that the Commerce Court could not award reparations, since that would involve the substitution of its judgment for that of the Commission (225 U. S. at 297), a reference to the limitation on judicial power which previously had been clearly enunciated in *Interstate Commerce Commission v. Union Pacific Railroad Company*, 222 U. S. 541, 547.

It seems clear that the *Procter & Gamble* decision was based solely on the negative character of the Commission's order dismissing Procter &

Gamble's complaint (*Rochester Telephone Corp. v. United States*, 307 U. S. 125, 135-6), and not upon any of the grounds that were to make their appearance later and become interwoven with the negative order doctrine. Moreover, the *Procter & Gamble* decision indicates that, prior thereto, the courts had jurisdiction to review the Commission's orders dismissing reparation complaints.

2. *The alternative remedies doctrine.*—Section 9 of the Interstate Commerce Act (49 U. S. C. 9) provides that any person claiming to be damaged by any common carrier subject to the Act may either make complaint to the Commission or bring suit for the recovery of such damages in any district court of the United States of competent jurisdiction; but that such person or persons shall not have the right to pursue both of said remedies and must in each case, elect which one of the two methods of procedure he or they will adopt. The district court here held that the suggestion that unless the United States may maintain a suit under the Urgent Deficiencies Act to review the Commission's order of dismissal, it is without a remedy, "is hardly well founded, because the United States has the opportunity of electing the other alternative remedy provided by the statute, namely, to bring suit against the common carriers in the United States District Court" (R. 134).

This conclusion appears to be clearly erroneous. In *Texas & Pacific Railway Company v. Abilene Cotton Oil Company*, 204 U. S. 426, this Court stated (p. 442):

In other words, we think that it inevitably follows from the context of the act that the independent right of an individual originally to maintain actions in courts to obtain pecuniary redress for violations of the act conferred by the ninth section must be confined to redress of such wrongs as can, consistently with the context of the act, be redressed by courts without previous action by the Commission, and, therefore, does not imply the power in a court to primarily hear complaints concerning wrongs of the character of the one here complained of.

Since, under the primary jurisdiction doctrine initially established in the *Abilene* case, the Government's complaint for damages before the Commission involved administrative questions exclusively within its jurisdiction, this Court's interpretation of Section 9 in the *Abilene* case clearly foreclosed initial resort to the courts in this case and would bar institution of such complaints for damages before the courts in all cases involving administrative questions. In *Armour & Co. v. Alton R. Co.*, 312 U. S. 195, *Armour* contended that it had a right under Section 9 to proceed in the district court for an alleged breach

of duty under the Interstate Commerce Act and to recover damages alleged to have resulted from the asserted violation of the Act. The district court dismissed Armour's complaint for want of jurisdiction. This Court unanimously affirmed this ruling. After referring to the *Abilene* case (312 U. S. 197) and summarizing the administrative problems that necessitated primary resort to the Commission (312 U. S. at 200-202), this Court stated, "The principles making up the so-called primary jurisdiction doctrine are well settled. This is obviously a case for their application." (312 U. S. at 202.)

Section 9, with its alternative remedies for damages, obviously refers to original jurisdictions, and not to appellate or review jurisdiction. Clearly, Section 9 does not refer to the institution of cases to review the Commission's orders under the Urgent Deficiencies Act, for the district courts in such cases have no power to award damages for violations of the Interstate Commerce Act. It has long been well established that in cases brought under the Urgent Deficiencies Act the power of the district courts is limited to determination of whether there has been violation of the Constitution, failure to conform to statutory authority, or the arbitrary exercise of power. *Interstate Commerce Commission v. Union Pacific Railroad Company*, 222 U. S. 541, 547; *Procter & Gamble v. United States*, 225 U. S. 282, 297;

*Rochester Telephone Corp. v. United States*, 307 U. S. 125, 147.

Thus, it is well established that Section 9 has no application to complaints for damages involving administrative questions which, under the primary jurisdiction doctrine, are within the Commission's initial and exclusive jurisdiction. The person damaged simply has no election in such cases. Further, it is clear that Section 9 refers to alternative original jurisdictions of cases seeking an award of damages, and not to suits instituted under the Urgent Deficiencies Act seeking review of the Commission's action on claims presented to it under Section 13 of the Interstate Commerce Act (49 U. S. C. § 13).

- Notwithstanding those firmly established propositions, the appellees here contend that the Government, having filed its complaint for reparations with the Commission, has made an election under Section 9 which estops it from maintaining this action under the Urgent Deficiencies Act. This contention rests upon this Court's decision in *Standard Oil Company v. United States*, 283 U. S. 235, subsequently referred to in *George Allison & Co. v. United States*, 12 F. Supp. 862 (S. D. N. Y.), affirmed, 296 U. S. 546, and *Ashland Coal & Ice Co. v. United States*, 61 F. Supp. 708 (S. D. Va.), affirmed, 325 U. S. 840.

The *Standard Oil* decision was rested first on the negative order doctrine, later overruled in

*Rochester Telephone Corp. v. United States*, 307 U. S. 125. Secondly, this Court held that the question as to which Standard Oil sought judicial determination was, in fact, an administrative question within the primary jurisdiction of the Interstate Commerce Commission. The third alternative ground for decision upon which the appellees rely heavily did rest on the elective provisions of Section 9. But this Court's discussion of that ground was rested on the assumption, contrary to the decision which it had announced in the preceding paragraphs of its opinion, that the question involved could, in the first instance, be decided by a district court. That was not the case here since, as we have shown, the question here involved could only be decided by the Commission as an original matter. Moreover, Section 9 was deemed applicable in the *Standard Oil* case, even on this assumption, only because Standard Oil sought from the three-judge court not only review of the order of the Interstate Commerce Commission but, in addition, "the same relief it failed to secure from the Commission" (283 U. S. at 241); i. e., an order directing an award of reparations. In the case at bar, the United States sought from the district court neither a money judgment nor an order directing the Commission to make an award. It sought and now seeks only to have the order denying relief set aside and a direction to reconsider the case in the light of the correct rule of law. See *infra*, pp. 61-102. The essential differ-

ence between this case and *Standard Oil* is that the Government seeks judicial review of a Commission order, while *Standard Oil* sought a judicial order as a substitute for what was held to be an indispensable administrative determination.

The *Allison* decision must be read as having been rested on the now discredited negative order doctrine. To treat this Court's *per curiam* opinion in that case as having any broader significance would require reading into that summary order a decision to overrule or modify the primary jurisdiction doctrine initially established in *Texas & Pacific Railway Co. v. Abilene Cotton Oil Co.*, 204 U. S. 426, 442, and reaffirmed in *Armour & Co. v. Alton R. Co.*, 312 U. S. 195, decided subsequently to the *Allison* case. Similarly, the *Ashland* case, though it cannot be read as resting on the negative order doctrine, cannot be taken as rejecting the primary jurisdiction doctrine and, indeed, this Court has not so treated it.

As heretofore noted (*supra*, p. 40), the *Ashland* decision was urged upon this Court in *El Dorado Oil Works v. United States*, 328 U. S. 12. The Commission and the United States there contended that the Commission's function in determining El Dorado's complaint was comparable to that exercised by it in reparation cases under Section 9, and, hence, that its findings were unassailable in a suit under the Urgent Deficiencies Act, citing the *Ashland* decision in support of

that contention. The analogy between Ashland's complaint before the Commission and that of El Dorado is apparent. Both Ashland and El Dorado sought money judgments, and recovery by both depended upon obtaining a favorable administrative determination from the Commission. Yet this Court rejected the contention made by the Commission and the United States because legal consequences would follow which would finally fix a right or obligation if the Commission's determination were upheld (328 U. S. at 18-19). Hence, it seems clear that the *Ashland* decision (and *a fortiori*, the *Standard Oil* and *Allison* cases), to the extent that it stands for the proposition that Section 9 forecloses review under the Urgent Deficiencies Act, must be deemed to be no longer authoritative.

Likewise, cases such as *Brady v. Interstate Commerce Commission*, 43 F. 2d 847 (N. D. W. Va.), affirmed, 283 U. S. 804; *Baltimore & Ohio R. Co. v. Brady*, 288 U. S. 448, and *Atlantic Lumber Corporation v. Southern Pacific Co.*, 47 F. Supp. 511 (D. Ore.), to the extent they hold that Section 9 precludes review under the Urgent Deficiencies Act, also appear to be no longer controlling. Moreover, the *Brady* cases and the *Atlantic* case involved no administrative question which, under the primary jurisdiction doctrine, gave the Commission exclusive jurisdiction over the complaints. In *Baltimore & Ohio R. Co. v. Brady*,

*supra*, this Court said, "The facts stated in the complaint clearly show that there was no question in this case requiring the exercise of the Commission's administrative powers." (288 U. S. at 457.) In the *Atlantic* case, "The ground of the [Commission's] decision was that the higher rate collected was in accord with and lawful under the established tariff." (47 F. Supp. at 512.)

There is no apparent reason why Section 9 should be held to foreclose review under the Urgent Deficiencies Act, for Section 9 obviously refers to alternative original jurisdictions and it should not be held to mean that judicial review is precluded where the complainant elects to go to the Commission. But if Section 9 operates so as to preclude review under the Urgent Deficiencies Act in any case, it seems clear that the rule applies only where the complainant has an election, as in the *Brady* cases and the *Allison* case, and that the rule has no application where, under the primary jurisdiction doctrine as established in the *Abilene* case (204 U. S. at 442) and reaffirmed in the *Armour* case (312 U. S. at 202), the complainant has no election of remedies.

Here the Government had no election of remedies. If it had attempted to file its complaint with a federal district court as ordinarily constituted, as both the Commission and the railroads contend and the district court held that the Government had a right to do, it is clear that

the primary jurisdiction doctrine would have required the district court to dismiss the complaint for want of jurisdiction, in conformity with this Court's decision in *Armour & Co. v. Alton R. Co.*, 312 U. S. 195. See also, *Lewis-Simas-Jones Co. v. Southern Pacific Co.*, 283 U. S. 654;<sup>17</sup> *Robinson v. Baltimore and Ohio Railroad Company*, 222 U. S. 506.

The *Armour* case appears to dispose of the suggestion that the Government had a right under Section 9 to bring its action before a court and to require that the proceeding be suspended while the Government secured by a complaint proceeding before the Commission, the indispensable administrative determination required under the primary jurisdiction doctrine. *Armour's* suit was dismissed for want of jurisdiction, not suspended pending the entry of administrative findings by the Commission. Thus, cases such as *Morrisdale Coal Co. v. Pennsylvania Railroad Company*, 230 U. S. 304, 314-315; *Mitchell Coal & Coke Co. v. Pennsylvania Railroad Company*,

<sup>17</sup> In *Lewis-Simas-Jones Co. v. Southern Pacific Co.*, 283 U. S. 654, 661, this Court said:

"It [the Interstate Commerce Act] makes a determination by the Commission of the unreasonableness of the rate attacked and the extent that it is, if at all, excessive a condition precedent to suit. \* \* \* no action for damages alleged to have been caused by the exaction of excessive rates for interstate transportation can be maintained in any court, state or federal, in the absence of a prior finding by the Commission that the rate charged was unreasonable."

230 U. S. 247, 266-7; and *Southern Railway Company v. Tift*, 206 U. S. 428, 434-5, no longer are controlling. Moreover, those cases involved special considerations which apparently persuaded this Court not to dismiss them for want of jurisdiction.<sup>18</sup> Compare those cases with *Texas & Pacific Railway Co. v. Abilene Cotton Oil Co.*, 204 U. S. 426, 442, 446, and *Robinson v. Baltimore and Ohio Railroad Company*, 222 U. S. 506. In the latter case, this Court said (p. 511) "it is apparent that neither provision [Sections 22 and 9] recognizes, or implies that an action for reparation, such as is here sought, may be maintained in any court, Federal or state, in the absence of an appropriate finding and order of the Commission."

Cases in assumpsit, such as *General American Tank Car Corp. v. El Dorado Terminal Co.*, 308

<sup>18</sup> Thus, in the *Mitchell* case, *supra*, this Court stated: "But owing to the peculiar facts of this case, the unsettled state of the law at the time the suit was begun and the failure of the defendant to make the jurisdictional point *in limine* so that the plaintiff could then have presented its claim to the Commission and obtained an order as to the reasonableness of the practice or allowance,—*direction is given that the dismissal be stayed*, so as to give the plaintiff a reasonable opportunity within which to apply to the Commission for a ruling as to the reasonableness of the practice and the allowance involved; and, if in favor of the plaintiff, with the right to proceed with the trial of the cause in the district court, in which the defendant shall have the right to be heard on its plea of the statute of limitations as of the time the suit was filed and any other defense which it may have" (230 U. S. 266, 267). [Italics supplied.]

U. S. 422, involving questions clearly within the general jurisdiction of the district courts but incidentally requiring resort to the Commission for determination of administrative questions arising during the course of the litigation before the courts, obviously afford no support for the proposition that the Government here had any independent right to proceed initially before a court and request the court to stay its hand pending resort to the Commission for determination of the administrative question. This Court itself made this distinction in the course of its opinion in the *El Dorado* case, 308 U. S. at 432-433. Likewise, cases such as *Bell Potato-Chip Co. v. Aberdeen Truck Line*, 43 M. C. C. 337, have no application here because no provision comparable to Section 9 is involved in such cases to give original jurisdiction to the Commission.

Thus, it seems clear that Section 9 has no application to proceedings instituted under the Urgent Deficiencies Act, especially where, as here, the problem involved is within the initial and exclusive jurisdiction of the Commission.

3. *Private character of reparation cases.*—This Court's decision in *El Dorado Oil Works v. United States*, 328 U. S. 12, authoritatively answers the contention that the quasi-judicial, or private, character of the Commission's orders denying reparations precludes review under the Urgent Deficiencies Act. There *El Dorado*, a shipper,

sought and secured the determination of the Commission as to what would be a just and reasonable allowance under the Interstate Commerce Act for cars which the shipper had furnished the railroads, and this Court took jurisdiction of the shipper's suit to review the Commission's determination, brought under the Urgent Deficiencies Act. As has been noted (*supra*, p. 40), the Commission and the United States unsuccessfully urged that the district court lacked jurisdiction because the Commission's "report affects only the private right of appellants to obtain a money judgment."

Moreover, it is well established that findings made by the Commission in reparation cases inure to the benefit of all shippers similarly situated and hence, such proceedings are not private in character. See *Inland Steel Co. v. United States*, 306 U. S. 153, 157; *Phillips v. Grand Trunk Railway Co.*, 236 U. S. 662, 665; *Rochester Telephone Corp. v. United States*, 307 U. S. 125, 142.

The notion that the quasi-judicial, or private, character of reparation suits precludes review under the Urgent Deficiencies Act had its genesis in the negative order cases. Compare *Brady v. Interstate Commerce Commission*, 43 F. 2d 847, 850-851 (N. D. W. Va.), with *Procter & Gamble Co. v. United States*, 225 U. S. 282, 293. Its force as a factor in determining the reviewability of the Commission's orders ended with the *El Dorado* case, *supra*.

In sum, cases<sup>10</sup> purporting to rest on the proposition that the quasi-judicial, or private, character of reparation suits precludes review under the Urgent Deficiencies Act have been thoroughly discredited. There is no longer any basis for contending that the quasi-judicial, or private, nature of reparation proceedings forecloses review.

4. *Discretionary power of the Commission in reparation cases.*—There is nothing in the Interstate Commerce Act which indicates that the Commission's discretion in reparation proceedings is any greater than or different from its discretion in proceedings seeking rates for the future. Compare Sections 15 (1) and 16 (1) of the Act (49 U. S. C. 15, 16). In the case of orders of the Commission prescribing rates for the future, the doctrine of administrative finality does not preclude review under the Urgent Deficiencies Act (*Interstate Commerce Commission v. Louisville & Nashville R. R. Co.*, 227 U. S. 88, 91; *Florida East Coast Ry. Co. v. United States*, 234 U. S. 167, 185; *New York v. United States*, 331 U. S. 284). There appears to be no reason for assuming that Congress intended that the doctrine of administrative finality should preclude entirely judicial

<sup>10</sup> *Procter & Gamble Co. v. United States*, 225 U. S. 282; *Ashland Coal & Ice Co., Inc. v. United States*, 61 F. Supp. 708 (S. D. Va.); *Atlantic Lumber Corporation v. Southern Pacific Company*, 47 F. Supp. 511 (D. Ore.); *Brady v. Interstate Commerce Commission*, 43 F. 2d 847 (N. D. W. Va.).

review under this Act of orders denying reparations. Indeed, such an intention could not be imputed to a Congress which provided review where reparation is granted (49 U. S. C. 16 (2)) to an extent at least as great as that here sought where reparation is denied.

It is well established that the term "administrative finality" denotes that the Commission's orders are subject to review on a narrow range of issues, not a lack of review. *Rochester Telephone Corp. v. United States*, 307 U. S. 125, 139-140. This Court rejected a contention in the *Chicago Junction Case*, 264 U. S. 258, 264-5, that approval of a proposed acquisition by a carrier of the property of another was a matter wholly within the discretion of the Commission, which precluded judicial review of the Commission's order of approval. In that connection this Court said, "Congress by using the phrase 'whenever the Commission is of opinion, after hearing', prescribed quasi-judicial action." Further, this Court stated that "These [the Commission's] orders, so far as considered by this Court, have uniformly been held to be subject to judicial review."

Where complaints seeking reparations are filed with the Commission, Section 13 of the Interstate Commerce Act (49 U. S. C. 13) affirmatively requires the Commission to investigate the com-

plaint. Section 16 of the Act (49 U. S. C. 16) imposes upon the Commission the duty to hold a hearing on the complaint. Sections 14 (49 U. S. C. 14) and 16 of the Act require the Commission to determine the facts as revealed by the investigation and, affirmatively, to make an award of reparations if the statutory standards are determined to so require. Thus, those provisions governing reparation proceedings clearly denote only a judicial discretion, and they do not provide any basis for a contention that Congress has conferred any arbitrary power on the Commission in such proceedings.

In the *Intermountain Rate Case*, 234 U. S. 476, 491, this Court stated that the standards of review of the Commission's orders,

but express the elementary principle that an investiture of a public body with discretion does not imply the right to abuse but on the contrary carries with it as a necessary incident the command that the limits of a sound discretion be not transcended which by necessary implication carries with it the existence of judicial power to correct wrongs done by such excess.

It is submitted that the discretion conferred upon the Commission, whatever its scope in cases like this, is nevertheless subject to review by the courts under the Urgent Deficiencies Act.

THE COMMISSION'S ORDER DISMISSING THE GOVERNMENT'S COMPLAINT IS VITIATED BY ERRORS OF LAW AND LACK OF A RATIONAL BASIS <sup>20</sup>

Commissioner Alldredge, in dissenting from the Commission's Report on Reconsideration, said (R. 100) :

The issue in this proceeding is, after all, a simple one. Prior to 1942, wharfage and handling between cars and ships at the particular piers involved were provided by private interests and the charges therefor, totalling 4 cents per 100 pounds, were absorbed by the defendants. This practice, together with other circumstances shown of record, establishes the fact that the line-haul rates of the defendants were made in contemplation of the absorption by them of these terminal charges. On June 15, 1942, the United States Army found it advisable or necessary, on account of the exigencies of war, to take over these terminal facilities and to perform the services; but defendants continued to exact the same line-haul

<sup>20</sup> In their respective statements as to jurisdiction, the Commission and the intervener railroads requested that if, on this appeal, this Court should decide that the lower court had jurisdiction, it should then pass on the validity of the Commission's order. Such procedure was followed in *El Dorado Oil Works v. United States*, 328 U. S. 12. Appellant concurs in this request that the Court dispose of the appeal on the merits and has, therefore, prepared this argument to show the invalidity of the Commission's order.

rates that applied when they absorbed the charges of their terminal agent.

The Government's complaint before the Commission was predicated upon the proposition that the railroads' common carrier obligation in the transportation of export traffic by railroad from interior points to Norfolk, Virginia, included the obligation not only to provide line-haul service, but also to furnish the piers and handling services required in order to place the export traffic within reach of ships' tackle. In other words, the Government's case was based upon the contention that providing piers and handling services on export traffic is a transportation service. This Court has held that unloading carload freight is "a part of transportation service within the meaning of the Interstate Commerce Act." *Railroad Retirement Board v. Duquesne Warehouse Co.*, 326 U. S. 446, 453. See, also, *Barringer & Co. v. United States*, 319 U. S. 1, 6. The railroads serving Norfolk, Virginia, have recognized for more than 50 years that providing piers and handling services on export traffic is a transportation service, without which export traffic could not be transferred to ships and, thereby, be transported to its ultimate destination. This recognition has been reflected in the railroads' tariffs fixing rates applicable to the transportation of export traffic to Norfolk (B. 74-75).

Here the Government provided piers and han-

dling services on its export traffic that moved from interior points to Norfolk for transportation therefrom by vessel to points overseas from June 15, 1942, until on or about July 3, 1946 (R. 610). Although it is undisputed that providing those facilities and services cost the Government more than four cents per hundred pounds of traffic (R. 85), the Government sought to recover as damages only four cents per hundred pounds, the amount previously paid by the railroads to the Transport Trading and Terminal Corporation for providing the same facilities and services (R. 85).

It is well established that where a shipper provides a transportation facility or performs a transportation service, included in the common carrier obligation, the shipper ordinarily is entitled to receive a just and reasonable allowance from the carrier under Section 15 (13) of the Interstate Commerce Act (49 U. S. C. 15). In *General American Tank Car Corp. v. El Dorado Terminal Co.*, 308 U. S. 422, where it was found that the shipper had provided cars to the railroads, this Court stated (p. 431): "The shipper was then entitled, under the plain terms of § 15 (13), to be paid by the carrier a just and reasonable allowance for providing the facility."

This proposition long has been settled. In *Interstate Commerce Commission v. Diffenbaugh*, 222 U. S. 42, this Court reviewed an order of the

Commission involving the question of whether an allowance should be made to a shipper for providing elevator service on his own grain. There the Commission ruled that making an allowance for providing a transportation facility was merely permissive and not mandatory on railroads under the terms of the Interstate Commerce Act, and that the Commission therefore, could prohibit allowances to shippers if it deemed such prohibition necessary to prevent undue preference. But this Court rejected the Commission's construction of the Act and set aside the order of the Commission based on such construction. This Court said (pp. 46-47):

We agree with the Court below that this decision is erroneous in its conception of the grounds on which under the statute an advantage may be pronounced undue, and in its assumption that Congress has left the matter open by merely permissive words \* \* \*. On the contrary the act of Congress in terms contemplates that if the carrier receives services from an owner of property transported, or uses instrumentalities furnished by the latter, he shall pay for them. That is taken for granted in § 15; the only restriction being that he shall pay no more than is reasonable, and the only permissive element being that the Commission may determine the maximum in case there is complaint (or now, upon its own motion. Act of

June 18, 1910, c. 309, § 12, 36 Stat. 539, 551).

Alternatively, the Government's complaint before the Commission was predicated upon the contention that the export rates named in the railroads' export tariffs, which included wharfage and handling services, were just and reasonable for providing the complete transportation service, and that the failure and refusal of the railroads to provide the facilities and perform the services included in their common carrier obligation resulted in unreasonable rates and charges for the complete transportation service. This proposition does not depend upon whether the railroads unlawfully failed and refused to make an allowance for wharfage and handling services on the Government's traffic that moved over Army Base piers, but rests on the contention that when the Government paid the railroads' export rates and also bore the expense of providing wharfage and handling services on its traffic, the payments to the railroads plus the wharfage and handling expenses resulted in rates and charges in excess of those which lawfully could be charged on the traffic in accordance with traditional criteria.

The Commission dismissed the Government's complaint. The Government, the appellant here, contends that the Commission's order dismissing its complaint is vitiated by errors of law and mis-

public commercial piers are transportation provided by them for the shippers." (R. 93). It seems clear that if, as the Commission found, wharfage and handling services are "transportation" at the public piers, they are transportation facilities and services included in the common carrier obligation. If wharfage and handling services are transportation facilities and services, the railroads' legal duty to provide such facilities and services is, we submit, no less or different than their legal duty to provide line-haul service.

The Commission's conclusion that providing the piers and handling services on export traffic delivered to water carriers is not included in the common carrier obligation is inconsistent with its finding as to the experience of the railroads in transporting such traffic. Here the Commission found that for more than 50 years it had been the general practice of railroads serving North Atlantic ports, including Norfolk, to unload from car to pier water-borne freight which the carriers transport by rail to the ports (R. 74). Specifically, the Commission found that the Pennsylvania Railroad Company entered into a contract in 1925 with Norfolk Tidewater Terminal, Inc., then the lessee and operator of the Army Base piers, in order to provide pier facilities and handling services for shippers (R. 75). The fact that the railroads referred to wharfage and handling services in their tariffs demonstrates that they are trans-

application of the statutory standards prescribed by Congress (*United States v. Carolina Freight Carriers Corp.*, 315 U. S. 475, 489) and that it also lacks the requisite "rational basis." *Rochester Telephone Corp. v. United States*, 307 U. S. 125, 146.

A. WHENEVER A COMMON CARRIER ACCEPTS GOODS FOR TRANSPORTATION TO POINTS BEYOND THE TERMINATION OF ITS LINE, THE CARRIER IS UNDER A LEGAL DUTY TO PROVIDE THE FACILITIES AND SERVICES NEEDED IN ORDER TO DELIVER THE TRAFFIC SAFELY TO ITS CONNECTING LINE.

The Commission concluded that it is neither the legal duty of railroads to provide piers nor to load or unload carload freight under the circumstances disclosed by the record in the proceeding before the Commission. The Commission's order of dismissal, here attacked, was predicated upon its conclusion that the railroads were under no legal duty to provide the piers and handling services on export traffic required to deliver the Government's export traffic to vessels for transportation to overseas destinations.

This conclusion appears to be erroneous as a matter of law. It has long been established at common law that whenever a common carrier accepts goods for transportation to a point beyond the termination of its line, the carrier is under the legal duty to deliver the traffic safely to its connecting line, whether a rail or water carrier. This duty arises from the obligation

implied in receiving for transportation goods shipped to destinations beyond the line of the receiving carrier. *Myrick v. Michigan Central Railroad Company*, 107 U. S. 102, 406; <sup>21</sup> *Texas & Pacific Railway Company v. Reiss*, 183 U. S. 621, 626; *New York Central Railroad Company v. The Talisman, Long Island R. Co.*, 288 U. S. 239, 241. It also has long been well established that whenever a common carrier accepts for transportation export traffic for delivery to a connecting water carrier, the common carrier thereby assumes the legal duty to provide adequate facilities needed to accomplish delivery of such traffic. *Galveston Commercial Assoc. v. A., T. & S. F. Ry. Co.*, 25 I. C. C. 216, 228; *Lighterage and Storage Regulations at New York*, 35 I. C. C. 47, 53.

The Commission attempted here to make a distinction between the railroads' practice of providing wharfage and handling services at so-called public piers and their practice with respect to providing such facilities and services at private piers. In that connection, the Commission found that "The wharfage and handling at the defendants'

<sup>21</sup> As indicated by the Court's opinion in the *Myrick* case, *supra*, the legal duty to forward traffic safely to connecting lines does not rest upon any obligation to transport, or arrange for transportation of, the traffic to its ultimate destination. Such an obligation exists only where it is specifically assumed and, of course, the initial carrier's liability for loss or damage to the goods at points beyond its line depends upon the responsibility it has assumed specifically, a question not presented here.

portation facilities and services, utilized for the movement of export traffic to its ultimate destination overseas. Cf. Section 6 (1) of the Interstate Commerce Act (49 U. S. C. 6).

Moreover, the Commission's conclusion regarding the railroads' legal duty under the circumstances here appears to be inconsistent with its failure to condemn the railroads for providing wharfage and handling services over other piers not only at Norfolk but also at other North Atlantic ports as a part of the transportation service covered by their rates. The Commission's failure so to condemn the railroads is sharply at variance with its condemnation of carriers for performing or making allowances for other services held not to be included in the common-carrier obligation, such as switching services within industrial plants. See *Propriety of Operating Practices—Terminal Services*, 209 I. C. C. 11. As Commissioner Splawn stated in his dissent (R. 112), "If the principles announced in that proceeding [*Propriety of Operating Practices—Terminal Services, supra*] were applicable at Norfolk when the Army operated its piers, they were and are equally applicable at Norfolk, when the Army piers were and are operated by a private corporation, and at all other ports, but neither the majority report nor defendants suggest that such services and absorptions be discontinued."

The arbitrary character of the Commission's conclusion that wharfage and handling services are not included in the common carrier obligation of railroads is further illustrated by the fact that, in determining the fair value of the property upon which railroads are entitled to earn a fair return from transportation and the expenses incurred in rendering the transportation services assumed in their tariffs, the Commission has permitted railroads to include, for rate-making purposes, the value of piers in their statement of capital devoted to transportation services and the cost of operating the piers in their operating expenses. *Charges for Wharfage, Handling, Storage, and Other Accessorial Services at Atlantic and Gulf Ports*, 157 I. C. C. 663, 695. Nor should the fact that steamship lines also utilize piers serve to confuse determination of the question whether wharfage and handling services are included in the common carrier obligation of railroads. There is a distinction between wharfage and dockage. Wharfage denotes use of the surface of piers for the receipt, delivery, and handling of cargo, whereas dockage indicates the use of piers by vessels as a mooring place. See *Charges for Wharfage, Handling, Storage, and Other Accessorial Services at Atlantic and Gulf Ports*, *ibid.*, p. 672.

Here the Commission conceded that providing handling services is included in the common car-

rier obligation where freight "is to be trans-  
 shipped by the railroads or their agents" (R.  
 102). This concession would seem to support  
 the contention made by appellant here, that pro-  
 viding wharfage and handling services is a trans-  
 portation service to be provided by the railroads  
 where export traffic is accepted by them for  
 transportation to points overseas. All of the  
 traffic involved in this controversy was accepted  
 by the railroads for transportation to shipside at  
 Norfolk, Virginia, with knowledge of the fact that  
 it was to be transported by vessel to overseas  
 destinations beyond Norfolk (R. 405).

Accordingly, it is submitted that the Commis-  
 sion's conclusion that wharfage and handling  
 services are not included in the common carrier  
 obligation of railroads is erroneous as a matter  
 of law and vitiates the Commission's order dismiss-  
 ing the Government's complaint.

**B. THE COMMISSION ERRED AS A MATTER OF LAW IN  
 HOLDING THAT THE RAILROADS' TARIFF PROVISIONS,  
 INCLUDING IN THE RATES WHARFAGE AND HANDLING  
 SERVICES, BECAME MEANINGLESS AFTER JUNE 15,  
 1942**

As heretofore noted, the Transport Trading and  
 Terminal Corporation was the lessee and operator  
 of the Army Base piers immediately prior to  
 June 15, 1942, when they were taken over by the  
 Government (R. 102). Prior to June 15, 1942,  
 and for extended periods thereafter, the

railroads' tariffs provided that wharfage and handling services at the piers of the Transport Trading and Terminal Corporation would be included in the rates applicable to export traffic transported by the carriers to Norfolk for export (R. 84, 89). Some of those tariff provisions remained unchanged nearly four years after the Government acquired possession of the Army Base piers (R. 89).

For example, the tariff of the Virginian Railway Company, one of the defendant railroads before the Commission, provided for absorption of wharfage, handling and terminal charges in words representative of the tariffs of all the railroads serving Norfolk (R. 426, 109):

At Lincoln Tidewater Terminals, Inc., Transport Trading and Terminal Corporation, or Southgate Terminal Corporation (Portsmouth Division Terminals).

Wharfage, handling and terminal charges, as published in Norfolk and Portsmouth Belt Line Railroad Tariff No. 6-J, I. G. C. No. 105 will be included in the transportation rates applicable to or from Norfolk, Va., on the following traffic moving in connection with the Virginian Railway through the above terminals: [Italics supplied.]

Although the Commission held that such a tariff undertaking establishes a legal duty to provide the handling services so specified in tariffs

(R. 102), the Commission sustained the railroads' contention that their tariffs providing for absorption of wharfage and handling service charges were not applicable to export traffic moving through the Army Base piers on and after June 15, 1942, the date upon which the Government assumed control of the piers, for the reason that, "In order to sustain the complainant's contention, therefore, it would be necessary to read into the tariffs words which were not there." (R. 103.) The Government contended before the Commission that the railroads, having so bound themselves to provide wharfage and handling services, were required by law either to make an allowance where the Government provided those facilities and services or to provide them at no additional expense to the Government. The Government's contention was that the railroads had violated the Interstate Commerce Act when they failed and refused to make adequate provision in their tariffs for such an allowance.

The Commission's interpretation of the railroads' tariffs involved no determination of fact. Thus, only a question of law was presented. Tariff provisions are to be construed strictly against the carrier and any doubt resolved in favor of the shipper. *Chicago & N. W. Ry. Co. v. Wilcox Co.*, 68 F. 2d 883 (C. A. 7), certiorari denied, 293 U. S. 560; *Union Wire Rope Corporation v. Atchison, T. & S. F. Ry. Co.*, 66 F. 2d

965 (C. A. 8). See also, *Raymond City Coal & Transportation Corporation v. New York Cent. R. Co.*, 103 F. 2d 56, 57 (C. A. 6); *Southern Pacific Co. v. Lothrop*, 15 F. 2d 486 (C. A. 9), certiorari denied, 273 U. S. 742.

The Commission expressed the opinion that cancellation of the lease of the Army Base piers to Transport Trading and Terminal Corporation on or about June 14, 1942, operated so as to make retention of the reference to the facilities of the Transport Trading and Terminal Corporation in the tariffs meaningless on and after June 15, 1942. The fallacy in the Commission's reasoning is clearly exposed by the dissent of Commissioner Splawn (R. 109):

A corporation may own, lease, or operate wharfage facilities, but certainly it is not a terminal and traffic cannot be delivered at or through it. The question is whether the tariffs should be construed in favor of the carriers as being meaningless and of no force and effect, as is done in the report, or in favor of the shipper as designating by the name "Transport Trading and Terminal Corporation" the Army piers as facilities over which the shipside rates applied and at which defendants would absorb the wharfage and handling charges, as was found by Division 2. The latter is the reasonable interpretation, for it permits the export rates to be applied and absorptions

made in accordance with the holding out in the rate tariffs. Defendants themselves must have so interpreted the tariffs when they paid allowances to the Norfolk Tidewater Terminals, Inc., from September 1, 1925, to December 1925 and later dates, although its name was not then mentioned in the tariffs.

The record here shows that the railroads' practice in designating piers in the tariffs was to indicate them as points and that they generally used the words "at" and "through" in referring to the facilities at which wharfage and handling services either would be absorbed or included in the rates applicable to export traffic (R. 84). Thus, for periods ranging from a few months to ten years from September 1, 1925, when Norfolk Tidewater Terminal Inc. operated the Army Base piers, they were referred to in the railroads' tariffs as municipal terminals, which identification resulted from the fact that previously the Army Base piers had been operated by the City of Norfolk (R. 84).

It is submitted that both the language used by the railroads in their tariffs and their long-standing construction of the tariffs demonstrate that the Commission's interpretation of the words in those tariffs was clearly erroneous as a matter of law.

C. THE COMMISSION'S CONCLUSION THAT THE GOVERNMENT'S CONTROL OF THE ARMY BASE PIERS JUSTIFIED THE RAILROADS IN TREATING THOSE PIERS AS PRIVATE PIERS LACKS A RATIONAL BASIS

When the Government succeeded to control of the Army Base piers on or about June 15, 1942, it retained the existing organization of the Transport Trading and Terminal Corporation, the last lessee and operator of those piers; performed the handling services with the same civilian employees, and under the same supervisory force; and conducted the pier operations in the same manner as the Transport Trading and Terminal Corporation had performed them (R. 78). There was no change in the loading and unloading operation (R. 78). The railroads' shipside rates continued to be applicable to the Government's and other shippers' traffic which moved over the Army Base piers on and after June 15, 1942 (R. 91). The railroads, through their wholly owned Belt Line subsidiary, continued to switch export traffic to the Army Base piers (R. 78).

As heretofore noted, the Government, through the War Department, initially sought from the railroads an allowance for wharfage and handling services on its traffic that moved over the piers on and after June 15, 1942 (R. 80). But the railroads refused to make any such allowance (R. 80). They attempted to justify their refusal

on the ground that "where control or operation of piers or other facilities is taken over by the Government for its own use or they are operated under contract with the Government and under Government supervision, such facilities should be treated the same as piers operated or controlled by the owners of the property transported, and loading and unloading should not be performed by the carriers, nor any allowance made in lieu thereof" (R. 80).

The Commission failed to find specifically that assumption of control of the Army Base piers by the Government converted them from public to private piers. Likewise, the Commission made no specific finding that the railroads were justified in treating the piers as private piers by reason of the control exercised by the Government. However, the Commission found that the railroads "distinguish between traffic moving over private and public or railroad owned piers" (R. 94), and it quoted extensively from its decision in *Weyerhaeuser Timber Co. v. Pennsylvania R. Co.*, 229 I. C. C. 463, 472. In the *Weyerhaeuser* case, *supra*, the Commission said, "The reasons for this policy [refusing to load and unload freight over private piers] are the difficulty of policing the practice, the necessity of performing the handling at the rail carriers' own convenience, the economy resulting from the concentration over a limited number of piers, and

the conservation of revenue." (229 I. C. C. 473.) As disclosed by the Commission's report (229 I. C. C. 473), the standards thus established clearly are applicable only where the facilities and services provided by the railroads at other piers are adequate, a situation which was not present at Norfolk during war time.

Moreover, the standards relied upon by the Commission appear not to be pertinent to the issues presented by the Government's complaint. Thus, the Commission made no finding that there was any need to police the Government's traffic moving over the Army Base piers, nor was there any evidence from which the Commission could have made any such finding. Normally traffic is policed in order to preclude misapplication of certain rates to traffic which under the railroads' tariffs, properly should be assessed higher rates. Further, the Commission made no finding, and there was no evidence which would have justified any such finding, that the railroads would have been precluded from policing the Government's traffic moving over the Army Base piers if they deemed it necessary for their protection.<sup>22</sup>

<sup>22</sup> In fact, the record shows (R. 405) that the railroads considered their policing rules to be unnecessary and unreasonable under wartime conditions on traffic moving over the Army Base piers and provided that such traffic would not be subject to those policing rules. See also, *Peden Iron & Steel Company v. Texas & New Orleans Railroad Company, et al.*, 264 I. C. C. 769, 772-3.

Likewise, the Commission failed to make any finding which reasonably could be construed to show that control of the Army Base piers by the Government would have interfered in any substantial way with handling the Government's traffic at the railroads' convenience. Moreover, any necessity for performing the handling services at the railroads' convenience during normal times would seem to give way to the statutory duty of the railroads to adopt every means within their control to facilitate and expedite military traffic (Section 6 (8) of the Interstate Commerce Act (49 U. S. C. 6)).

There was no proposal before the Commission that the railroads make an allowance for wharfage and handling services or provide service over piers not previously utilized for that purpose by the railroads. Accordingly, making an allowance for wharfage and handling services or providing those facilities and services on the Government's traffic would not have required the railroads to forego any economy which they enjoyed prior to June 15, 1942.

Correspondingly, the standards with respect to conservation of revenue appear to have no relevancy to the Government's complaint, as making an allowance for wharfage and handling services or providing the facilities and services on the Government's traffic would have left the railroads in precisely the same financial position on traffic

handled over the Army Base piers on and after June 15, 1942, that they enjoyed with respect to similar traffic handled over those piers prior to that date. Moreover, to have granted an allowance for wharfage and handling on the Government's traffic which moved over the Army Base piers or to have provided wharfage and handling services on such traffic themselves, would have left the railroads' net revenues substantially the same as those derived by the carriers from traffic handled over all other piers, not only in the Norfolk port district but also in all other North Atlantic ports.

Further, according an allowance for wharfage and handling services to the Government or providing those facilities and services on the Government's traffic would not have established a precedent which would have offered any threat to the railroads' revenues. Operators of purely private piers could not satisfy the tests established in the *Weyerhaeuser* case, *supra*, so that they could not complain if wharfage and handling services were accorded on the Government's traffic moving over the Army Base piers and denied to the private pier owners in the absence of a showing that the facilities and services afforded by the railroads on their traffic were inadequate. See the Commission's report in the *Weyerhaeuser* case, 229 I. C. C. 463.

Control of the Army Base piers by the Government on and after June 15, 1942, clearly did not convert them from public to private piers. Commercial traffic moved over the piers to the maximum extent compatible with the prompt and expeditious movement of military freight (R. 79). Approximately 700 carloads of commercial freight moved over the Army Base piers between June 15, 1942, and July 18, 1944 (R. 79).

The arbitrary character of the Commission's conclusion that the control of the Army Base piers by the Government on and after June 15, 1942, provides any basis for refusing to make an allowance for wharfage and handling services or to provide those facilities and services is illustrated by the Commission's prior decisions in substantially identical situations. Thus, in *Elimination of New York, N. H. & H. R. Pier Stations*, 255 I. C. C. 305, the railroad, by tariff amendment, proposed to relieve itself of its stated responsibility for the expense of loading and unloading freight interchanged with water carriers at certain piers in Boston and Providence, Rhode Island, including a pier owned and operated by the War Department and another leased by the Navy Department, on the ground that the piers were used to such an extent for military purposes that they no longer could be regarded as public piers open for general commercial traffic. There the Commission stated (255 I. C. C. at 308):

Respondent treated these piers for many years as some of its principal public port facilities at which commercial shipments were loaded and unloaded, that service being included in the line-haul rates. We are of the opinion that the circumstances upon which it now relies as justification for discontinuance of that service do not warrant the conclusion that the piers in question should at this time be treated as private piers.

Accordingly, we submit that the practice of the railroads with respect to making allowance for wharfrage and handling services at private piers affords no rational basis for denying such allowances on the Government's traffic that moved over the Army Base piers on and after June 15, 1942.

D. THERE IS NO RATIONAL BASIS FOR THE COMMISSION'S CONCLUSION THAT CONTROL OF THE ARMY BASE PIERS BY THE GOVERNMENT RELIEVED THE RAILROADS OF THEIR OBLIGATION TO PROVIDE WHARFAGE AND HANDLING SERVICES.

Although the Commission stated that the railroads were under no obligation to provide wharfrage and handling services at the Army Base piers, which it deemed to be sufficient to relieve the railroads of all responsibility for their failure and refusal to provide those facilities and services, the Commission went on to hold that even if there were such an obligation, the railroads were relieved of such obligation by reason of the fact

that the Army Base piers were under the control of the Government on and after June 15, 1942 (R. 89-90). This conclusion rested upon the Commission's subsidiary conclusion that "anything but operation by the complainant was impractical" (R. 90).

The Commission's conclusion that anything but operation by the Government was impractical rested upon its additional conclusions: (1) that "all activities on the piers had to be supervised and coordinated by a governing head" (R. 90), (although the Commission failed to note the obvious fact that this was true in peacetime), (2) the railroads "would have been obliged to pool their activities and operate as a unit" (R. 90), and (3) "troops would have had to be used" (R. 90).

The invalidity of the Commission's conclusions clearly appears when they are measured against its findings. Thus, the Commission found that the Government "indicated a willingness to have the defendants do the work and to let them have its civilian force" (R. 90). The Commission's conclusion that "Troops would have had to be used, and obviously anything but operation by the complainant was impractical" (R. 90) should be compared with the Commission's finding that at the Lambert Point piers handling services were performed by both civilian and military personnel under civilian supervision (R. 77, 92). The Government de-

manded of each railroad, on November 9, 1943, that it "immediately take the necessary steps to fulfill completely its undertaking under line-haul 'ship-side' rates on water-borne traffic" (R. 386-387). This demand was made on behalf of the Government by the Commanding General of the Hampton Roads Port of Embarkation, at the height of hostilities, and thus necessarily reflected the judgment of a responsible military commander as to what was practical under the circumstances. Further, even though the Commission's subsidiary conclusions (*supra*, p. 83) might have provided a rational basis in peacetime for the ultimate conclusion that the railroads thereby "were relieved of their obligation to provide wharfage and handling services, that conclusion certainly lacks rational basis as applied to wartime conditions. By the terms of Section 6 (8) of the Interstate Commerce Act (49 U. S. C. 6), the railroads were required to "adopt every means within their control to facilitate and expedite the military traffic." Those means were defined by the Commanding General of the Hampton Roads Port of Embarkation when he demanded of the railroads that they perform their tariff undertakings.

The Commission's reliance (R. 90) upon *King & Co., Terminal Allowance*, 255 I. C. C. 531, and *John Morrell & Co., Terminal Allowance*, 263 I. C. C. 69, as support for its conclusion that the railroads were not under obligation to perform the handling services because they would have

been obliged to pool their activities and operate as a unit, also appears to lack substance as applied to the circumstances of the present case. The asserted absence of any such obligation under normal circumstances appears not to be important when, as here, the Government offered the railroads the same civilian force used by the Transport Trading and Terminal Corporation (R. 90), which the railroads previously had employed to perform the handling services. Further, even though it were to be conceded that carriers are not required to pool their activities under normal circumstances, their refusal to do so here should be measured against their war time duty to "adopt every means within their control to facilitate and expedite the military traffic."

Predicated upon its conclusion that "anything but operation by the complainant was impractical," the Commission decided that when a carrier is prevented from performing a transportation service by the election of the industry to perform it, and when the service of the carrier would not meet the needs and convenience of or be satisfactory to the industry, the carrier's duty to perform the service under the line-haul rate is discharged and there is no obligation resting upon it to make an allowance to the industry for performing the service, citing the rule established by the Commission in *Propriety of Operating Practices—Terminal Services*, 209 I. C. C. 11, 29.

Not only was there no factual basis for the Commission's conclusion that control of the Army Base piers by the Government prevented the railroads from performing their common carrier obligation, but also the rule invoked by the Commission was established to control rebating and rendition of gratuitous services, not included in the common carrier obligation, under the guise of providing transportation service, and not to relieve the railroads from providing facilities and performing services clearly included in the common carrier obligation, that is, to provide the facilities and services needed in order to safely deliver traffic to their connecting lines.<sup>23</sup> Finally and, in any event, the practicalities of Government operation certainly did not constitute a bar to an allowance by the railroads in lieu of the services.

The Commission also concluded that the railroads had discharged their transportation obligation when the cars were delivered to a storage yard approximately one mile distant from the Army Base piers (R. 76, 104-105). This conclusion also rested upon the Commission's basic premise that control of the Army Base piers by the Government prevented the railroads from making

<sup>23</sup> The law does not require a shipper to suffer from inadequate service where adequate facilities are available to provide the service. See Section 1 (4) of the Interstate Commerce Act (49 U. S. C. 1); also, see *Chesapeake & Ohio Railway Company v. Westinghouse, Church, Kerr & Co., Inc.*, 270 U. S. 260.

shipside delivery, in accordance with the practice prior to June 15, 1942. The fallacy in the Commission's conclusions in that respect is demonstrated by the fact that the Commission also found that the railroads provided a locomotive and crews to switch railroad cars to and from the piers (R. 78, 89, 104), a service which the railroads apparently conceded they were required to perform and for performing which the Commission found no reason to criticize the carriers.

E. THERE IS NO RATIONAL BASIS FOR THE COMMISSION'S CONCLUSION THAT THE RAILROADS DID NOT FAIL TO PROVIDE REASONABLE PIER FACILITIES UNDER THE CIRCUMSTANCES

Although the Commission concluded that the railroads were under no obligation to provide wharfage and handling services on the Government's traffic that moved over the Army Base piers, it also concluded that "there is no showing that the defendants have failed to provide reasonable pier facilities, even assuming that they were legally bound to do so." (R. 93.)

The lack of a rational basis for that conclusion is shown by the Commission's finding that, "Some of the defendants serving Norfolk have piers at which the complainant's freight could be handled. According to a witness for the complainant, however, the capacity of those piers was sufficient to handle only 37 percent of the traffic that moved over the complainant's 2 piers in 1943." (R. 93.)

Even in peacetime the railroads found the other piers in Norfolk to be inadequate for their purposes and, hence, sought and secured the use of the Army Base piers (R. 76-77). The Commission found that during the war the Government's traffic increased tenfold (R. 77). Moreover, the arbitrary character of the Commission's conclusion that the Government made no showing that the railroads had failed to provide adequate facilities and services is illustrated by the fact that the Commission's findings show that the other piers in the Norfolk Port District either were fully utilized for other purposes or were inadequate to handle the traffic in controversy, because of the lack of modern equipment or some other reason. (R. 76-77, 99.)

Accordingly, it is undisputed that the railroads failed to provide adequate facilities and services. The Commission's conclusion simply does not square with its finding that "about 37 percent [of the Government's traffic] could have been handled over the piers just described if the Army Base piers had not been available." (R. 77.)

F. THE COMMISSION'S CONCLUSION THAT THE RAILROADS' FAILURE AND REFUSAL TO PROVIDE WHARFAGE AND HANDLING SERVICES OR TO MAKE AN ALLOWANCE THEREFOR WAS NOT UNJUSTLY DISCRIMINATORY LACKS A RATIONAL BASIS

Section 2 of the Interstate Commerce Act (49 U. S. C. 2) condemns as unjust discrimination

the collection from any person or persons of a greater or less compensation than the carrier collects "from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions."<sup>24</sup>

Here the railroads collected from the Government the same rates for less service than they "contemporaneously accorded shippers at other ports and at other public pier facilities at the port of Norfolk" (R. 100), a result condemned by Section 2 of the Act. In other words, they collected a charge from the Government for facilities and services which they failed and refused to provide, but which they provided for other shippers at other piers at Norfolk and which was also provided to commercial, or private, shippers on

<sup>24</sup> The "circumstances and conditions" to which Section 2 refers are those which are incident to the transportation service rendered and not those which are extraneous thereto."

*Grain Proportionals, Ex-Barge to Official Territory*, 248 L. C. C. 307, 316. See, also, *Wight v. United States*, 167 U. S. 512; *Interstate Commerce Commission v. Alabama Midland Ry Co.*, 168 U. S. 144; *Interstate Commerce Commission v. Delaware, L. & W. R. Co.*, 220 U. S. 235; *Interstate Commerce Commission v. Baltimore and Ohio R. Co.*, 225 U. S. 326; *Seaboard Air Line Ry. Co. v. United States*, 254 U. S. 57; *Atchison, T. & S. F. Ry. Co. v. United States*, 279 U. S. 768; *Louisville & Nashville R. Co. v. United States*, 282 U. S. 740; *Merchants Warehouse Co. v. United States*, 283 U. S. 501; *United States v. Chicago Heights Trucking Co.*, 310 U. S. 344; *Interstate Commerce Commission v. Meckling*, 330 U. S. 567.

traffic moving over the Army Base piers during the period here in controversy (R. 85-86).

In *Union Pacific Railroad Company v. Updike Grain Company, et al.*, 222 U. S. 215, the failure to pay Updike an allowance for the elevation of its own grain while paying Peavey & Co. (see *Interstate Commerce Commission v. Diffenbaugh*, 222 U. S. 42) such an allowance for elevation of grain, including its own grain and that of other shippers, was condemned as discriminatory and unreasonable. The statements made by this Court in that case appear to be equally applicable here (222 U. S. 219-220):

When the service was rendered, the carrier received value for which it was bound to pay, whether performed by the owner of the grain or some other person hired for the same purpose. \* \* \*

The carrier cannot pay one shipper for transportation service and enforce an arbitrary rule which deprives another of compensation for similar service. To receive the benefits of such work by one elevator without making compensation therefor would, in effect, be the involuntary payment by such elevator of a rebate to the railroad company, for it would enable the railroad company to receive more net freight on its grain than was received from its competitor located on the railroad's tracks.

This Court's discussion of the questions presented in the *Urdike* case clearly shows that it was concerned with the difference in treatment as between shippers, and that the shipper who received elevation on his grain at the Peavey & Co. elevator paid less for the total service than the Urdike Grain Co. when it handled its grain at its own elevator.

The Commission refused to sustain the Government's charge that the unequal treatment here as between the Government and private shippers constituted unjust discrimination, contrary to Section 2' of the Act. In this connection the Commission said (R. 105):

With respect to the allegation of unjust discrimination, the complainant asks to be treated the same as commercial or private interests. The defendants argue that when these two piers were taken over by the complainant on June 15, 1942, they became private piers to all intent and purpose. The defendants do not pay allowances to private shippers for wharfage or for handling export freight, and they do not perform that service on private piers. As indicated, the defendants are not legally bound to provide pier facilities. *Wharfage Charges at Atlantic and Gulf Ports*, 157 I. C. C. 663, 174 I. C. C. 263. Notwithstanding that, they do have pier facilities at Norfolk the capacity of which is

sufficient to handle almost four times the amount of normal shipments of the complainant. During the war, however, the complainant's traffic increased tenfold. The freight of other shippers at Norfolk which receives unloading service is not the like kind of traffic contemplated by section 2 of the act dealing with unjust discrimination, and if handled in the same manner as the complainant's freight the export rates would not apply, much less the accessorial service demanded by the complainant or an allowance therefor.<sup>25</sup>

The plain purport of what the Commission has said here is that even though a difference in treatment might be discriminatory under peacetime conditions,<sup>26</sup> as a norm, a "tenfold" increase in traffic would justify the carriers in according different treatment to like traffic on the ground that the increased volume of traffic would not be the "like kind of traffic contemplated by section 2 of the act." (R. 105.)

But it would seem elementary that the increased volume of the Government's traffic is not

<sup>25</sup> The Commission apparently failed to consider the tariffs of the Official Territory railroads, for such tariffs made the export rates applicable not only to the Government's traffic moving over the Army Base piers, but also to the traffic of private shippers handled in the same manner (R. 405).

<sup>26</sup> As before pointed out, p. 88, *supra*, the carriers found their port facilities at Norfolk to be inadequate during peacetime, and utilized the Army Base piers to meet the needs of normal traffic.

a just ground for discriminatory treatment. Traffic does not become unlike merely because it moves in greater volume during a particular period.

Likewise, a difference in handling may not be applied as a standard to determine whether traffics are unlike. Thus, there is no "rational" basis for the Commission's statement that "The freight of other shippers at Norfolk which receives unloading service is not the like kind of traffic contemplated by section 2 of the act dealing with unjust discrimination, and if handled in the same manner as the complainant's freight the export rates would not apply \* \* \*" (R. 105). Whether there was any difference in handling the export traffic of the Government and private shippers is to be tested by the proper application of the standard, "substantially similar circumstances and conditions," which is the basic question presented here under Section 2, and any alleged difference in handling has no relation to determination of the question whether the traffic of the Government and traffic of private shippers moved over the several piers at Norfolk were "like kind of traffic." The railroads made no contention before the Commission that different treatment was justified because the traffic were unlike, but they defended on the ground that the circumstances and conditions at the piers over which the handling services were

performed by them and at the Army Base piers after repossession by the Army on June 15, 1942, were not similar, the fallacy of which contention we have previously shown.

The proper application of Section 2, free from this confusion of ideas, was clearly demonstrated by Division 2. It found that the railroads paid a wharfage and handling charge of about 4 cents on export traffic handled over the pier of the Norfolk & Western at Sewall Point, about one mile north of the Army Base piers and known during the war as United Nations Depot, and that a similar allowance was made at the Lambert Point pier, both of which piers were also served by the Belt Line (R. 76-77). Based on these and other findings, Division 2's ultimate conclusion was (R. 85-86).

that defendants' failure and refusal to furnish wharfage and perform handling in connection with complainant's traffic or to make an allowance to complainant in lieu thereof, while contemporaneously furnishing and performing them in connection with like traffic of other shippers moving through Norfolk, is and for the future will be unjustly discriminatory in violation of section 2 of the act \* \* \*

Hence, we submit that the Commission has misapplied the statutory standards established in Section 2 of the Act.

G. THERE IS NO RATIONAL BASIS FOR THE COMMISSION'S CONCLUSION THAT THE REFUSAL OF THE RAILROADS TO PROVIDE WHARFAGE AND HANDLING SERVICES DID NOT RESULT IN UNREASONABLE RATES AND CHARGES ON THE GOVERNMENT'S TRAFFIC

As heretofore noted, the Government's complaint before the Commission was predicated alternatively upon the proposition that the railroads' export rates, which included wharfage and handling services, were just and reasonable for providing the complete transportation service, and that the railroads' failure and refusal to provide the facilities and services included in their common carrier obligation resulted in unreasonable rates and charges for the complete transportation service.

But the Commission also determined that question adversely to the Government. This determination resulted from the Commission's conclusion "that the line-haul rates charged on this traffic were and are less than reasonable maxima, and that nothing has been added to them to cover the cost of wharfage and handling,"<sup>27</sup> and "as nothing has been added to the export rates here in issue to

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<sup>27</sup> The witness for the Port of New York Authority, who had no interest in the merits of the controversy (R. 302), testified before the Commission (R. 302) that, "Of all these years during which freight rates were revised tariffs of the carriers continued to hold out to the public these lighterage services, also loading and unloading as included in the rates. Hence, it must be presumed that the freight rates were made to include the delivery to or receiving from steamships. In no sense

cover the wharfage and handling they are not above a reasonable maximum level when a reasonable charge for wharfage and handling is added [to them]." (R. 105, 108.) The Commission's conclusion that the export rates were less than reasonable maxima was predicated upon the fact that the export rates were less than the domestic rates to and from Norfolk (R. 105-106).

As Commissioner Splawn aptly stated in his dissent (R. 111):

There is no inference or presumption that because export rates are lower than domestic rates that they are less than maximum reasonable rates. The maintenance of such export rates is so general that it may be said to be standard practice, and we have frequently prescribed them. Due to the port differentials, the export rates to at least three of the principal north Atlantic ports, New York, Philadelphia, Baltimore and Norfolk, are lower in every instance than the domestic rates, the exception being the port to which the domestic rate is treated as the key rate under that adjustment.

Moreover, apart from what was said by Commissioner Splawn, the evidence before the Com-

is it a free service." Obviously the cost of wharfage and handling services provided by the railroads was included in making the rates, for the rates include the facilities and services and the railroads receive no other compensation on such traffic from shippers.

mission clearly shows that the railroads' export rates to Norfolk could not exceed other rates available to shippers to other ports if the carriers were to obtain a fair share of the available export traffic. In 1932, the Commission prescribed new domestic class rates (R. 285). This required adjustment of the export rates to all ports because they were higher than the new domestic rates (R. 285). The newly prescribed domestic rates to Baltimore became the new standard for export rates because of average shorter distances from inland shipping points to Baltimore than to the other North Atlantic ports and hence, under the newly prescribed scale of rates, lower rail charges on export traffic moving to Baltimore (R. 285). The newly prescribed domestic rates to Norfolk from competitive origins were substantially higher than the newly prescribed domestic rates to Baltimore, which required the railroads to establish export rates to Norfolk no greater than the domestic rates to Baltimore in order for the railroads serving Norfolk to secure any export traffic. For example, export traffic shipped from inland points, such as Chicago, could move through either Baltimore or Norfolk and, unless the Norfolk export rates were made no greater than the Baltimore domestic rates, the railroads serving Baltimore would have secured the export movement. Thus, the controlling factor with respect to the Norfolk export rates was the level of the newly

prescribed domestic rates to Baltimore. (R. 298), not the newly prescribed domestic basis to Norfolk. In fact, a witness for the railroads described the Baltimore domestic rates as "a controlling factor in determining the reasonableness of" the Norfolk port rates (R. 298). [Italics supplied.]

The factor which caused the railroads serving Norfolk to establish export rates no higher than the newly prescribed domestic rates to Baltimore is illustrated well by the testimony of a witness for the Port of New York Authority. "The advantages of one port in rates operates to divert to that port traffic which would normally move, and in the past has moved, through New York." (R. 300). It seems clear that the maximum rates on export traffic to Norfolk under normal circumstances could be no greater than the newly prescribed domestic rates to Baltimore, for otherwise the railroads serving Norfolk, under normal conditions, could not have secured any export traffic moving from inland competitive points.

The southern railroads likewise were required to observe as maxima, rates no greater than the newly prescribed rates to Baltimore because, as a witness for the southern carriers testified, "Another exception is that from Ohio River Crossings, we have established rates which include the wharfage and handling charges to enable us to compete with the port of Baltimore. The rates

from the competitive territory are made the same as to Baltimore because the rates to that port include wharfage and handling charges." (R. 348.)

In addition, the record before the Commission shows that Section 4 of the Interstate Commerce Act (49 U. S. C. 4), the long and short haul clause, operated so as to force the railroads serving Norfolk to observe the newly prescribed Baltimore rates as maxima on traffic upon which the southern railroads wished to impose additional charges for wharfage and handling services. Thus, a witness for the southern railroads testified that "it was found that the rates to Norfolk were higher when you added to them the wharfage and handling charge than the rates to Baltimore. So to clear up the departure under Section 4, the Commission required us to observe the Baltimore rates as maximum." (R. 352.)

Even the Commission recognized in this proceeding that the competitive situation is the controlling factor in determining the maximum rate level at which traffic will move through the port of Norfolk. "For competitive reasons the defendants accord Norfolk the same export rates as Baltimore, Md., despite the substantially greater distances to Norfolk from important shipping origins." (R. 105.)

If rates are to be made in the light of their indispensable requirement that they must move

traffic where there is any traffic or be only paper rates, prohibitory of the movement, then there simply is no rational basis for the Commission's conclusion that the export rates plus a reasonable charge for wharfage and handling services would not exceed reasonable maxima, for the record shows that export traffic would not move through the port of Norfolk on that basis.<sup>28</sup> It is not enough that export rates are intrinsically reasonable. They must also be relatively reasonable. The Commission has condemned domestic rates prescribed by it as unjust and unreasonable for application to export traffic because the domestic rates were relatively higher than the export rates to competitive ports. *Albany Port District Commission v. Ahnapsee & Western Railway Company*, 219 I. C. C. 151, 163-165. Cf. *Wyoming Coal Co. v. Virginian Ry. Co.*, 98 I. C. C. 488; *Virginian Ry. Co. v. United States*, 272 U. S. 658. The Commission also held in the *Albany* case that the practical result of the failure of the railroads to absorb wharfage and handling charges is to add those charges "to the line-haul rates applying on Albany's port traffic" (219 I. C. C. 174). Export rates, like other rates, must not exceed "what the traffic will bear." *Live-stock-Western District Rates*, 176 I. C. C. 1, 82-83.

<sup>28</sup> The Government made no charge to private shippers for wharfage and handling services on commercial traffic which moved over the Army Base piers, anticipating that the railroads would be required by the Commission to compensate the Government for those facilities and services (R. 179).

In the exercise of its power to prescribe just and reasonable rates, the Commission must give due consideration "to the effect of rates on the movement of traffic" (49 U. S. C. 15a), which means, of course, that rates which will not move export traffic are beyond reasonable maxima.

There are other reasons why the railroads' export rates plus reasonable charges for wharfage and handling services would exceed reasonable maxima. Thus, testimony before the Commission showed clearly that rates in excess of the export rates to North Atlantic ports would divert traffic from those ports to Montreal, New Orleans and other ports. (R. 318-319.) In other words, the port relationship in rates is extremely sensitive and any attempt to add the cost wharfage and handling services to those rates would place "Baltimore and other North Atlantic ports \* \* \* at a competitive disadvantage with New Orleans and other southern ports, as well as Montreal and other Canadian ports with which the North Atlantic ports are in competition under normal conditions." (R. 319.) The Commission recognized the force of this fact (R. 97), but it disregarded this circumstance in making its determination that the export rates plus reasonable charges for wharfage and handling services would not exceed reasonable maxima.

We submit that there is no rational basis for the Commission's conclusion that the railroads' export rates plus charges for wharfage and handling serv-

ices would not exceed reasonable maxima where the record shows clearly that such treatment would divert traffic from Norfolk to other ports. On the contrary, it is submitted that the record here shows that the export rates established by the railroads, which included wharfage and handling services, were maxima.

#### CONCLUSION

For the foregoing reasons, it is submitted that the district court's judgment should be vacated and set aside and, that the proceeding should be remanded to the Commission for further proceedings.

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FEBRUARY, 1949.

## APPENDIX

The pertinent provisions of the Judicial Code as amended by the Urgent Deficiencies Act of October 22, 1913, 38 Stat. 208 (28 U. S. C. (1946 ed.) 41 (28), 43-47, 48; section numbers are to United States Code) are as follows:

§ 41. *Original jurisdiction.*—The district courts shall have original jurisdiction as follows:

(28) *Setting aside order of Interstate Commerce Commission.*—Twenty-eighth. Of cases brought to enjoin, set aside, annul, or suspend in whole or in part any order of the Interstate Commerce Commission.

§ 43. *Venue of suits relating to orders of Interstate Commerce Commission.*—The venue of any suit brought to enforce, suspend, or set aside in whole or in part, any order of the Interstate Commerce Commission shall be in the judicial district wherein is the residence of the party or any of the parties upon whose petition the order was made, except that where the order does not relate to transportation or is not made upon the petition of any party the venue shall be in the district where the matter complained of in the petition before the commission arises, and except that where the order does not relate either to transportation or to a matter so complained of before the commission the matter covered by the order shall be deemed to arise in the district where one of the petitioners in court has either its principal office or its principal operating office. In case such

transportation relates to a through shipment the term "destination" shall be construed as meaning final destination of such shipment. (Oct. 22, 1913, ch. 32, '38 Stat. 319.)

§ 44. *Procedure in certain cases under interstate commerce laws; service of processes of court.*—The procedure in the district courts (a) in respect to cases for the enforcement, otherwise than by adjudication and collection of a forfeiture or penalty or by infliction of criminal punishment, of any order of the Interstate Commerce Commission other than for the payment of money shall be as provided in sections 45, 45a, 47a, and 48 of this title and (b) in respect to cases brought to enjoin, set aside, annul, or suspend in whole or in part any order of the Interstate Commerce Commission shall be as provided in sections 45, 45a, 47, 47a, and 48 of this title. The orders, writs, and processes of the district courts may in the cases specified in this section and in the cases and proceedings under sections 20, 43, and 49 of Title 49, run, be served, and be returnable anywhere in the United States. (Oct. 22, 1913, ch. 32, '38 Stat. 220.)

§ 45. (*Judicial Code, section 209.*) *District Courts; practice and procedure in certain cases.*—The jurisdiction of the district courts of the cases specified in section 44 of this title, and of the cases and proceedings under sections 20, 43, and 49 of Title 49, shall be invoked by filing in the office of the clerk of the court a written petition setting forth briefly and succinctly the facts constituting the petitioner's cause of action, and specifying the relief sought. A copy of such petition shall be forthwith served

by the marshal or a deputy marshal of the district court or by the proper United States marshal or deputy marshal upon every defendant therein named, and when the United States is a party defendant, the service shall be made by filing a copy of said petition in the office of the Secretary of the Interstate Commerce Commission and in the Department of Justice. Within thirty days after the petition is served, unless that time is extended by order of the court or a judge thereof, an answer to the petition shall be filed in the clerk's office and a copy thereof mailed to the petitioner's attorney, which answer shall briefly and categorically respond to the allegations of the petition. No replication need be filed to the answer, and objections to the sufficiency of the petition or answer as not setting forth a cause of action or defense must be taken at the final hearing or by motion to dismiss the petition based on said grounds, which motion may be made at any time before answer is filed. In case no answer shall be filed as provided herein the petitioner may apply to the court on notice for such relief as may be proper upon the facts alleged in the petition. The court may, by rule, prescribe the method of taking evidence in cases pending in said court. (Mar. 3, 1911, ch. 231, § 209, 36 Stat. 1149; Oct. 22, 1913, ch. 32, 38 Stat. 219.)

§ 45a. (*Judicial Code, sections 212, 213.*)  
*Special attorneys; participation by Interstate Commerce Commission; intervention.*—The Attorney General shall have charge and control of the interests of the Government in the cases specified in section 44 of this title and in the cases and proceedings under sections 20, 43, and 49

of Title 49, in the district courts, and in the Supreme Court of the United States upon appeal from the district courts. If in his opinion the public interest requires it, he may retain and employ in the name of the United States, within the appropriations from time to time made by the Congress for such purposes, such special attorneys and counselors at law as he may think necessary to assist in the discharge of any of the duties incumbent upon him and his subordinate attorneys; and the Attorney General shall stipulate with such special attorneys and counsel the amount of their compensation, which shall not be in excess of the sums appropriated therefor by Congress for such purposes, and shall have supervision of their action: *Provided*, That the Interstate Commerce Commission and any party or parties in interest to the proceeding before the commission, in which an order or requirement is made, may appear as parties thereto of their own motion and as of right, and be represented by their counsel, in any suit wherein is involved the validity of such order or requirement, or any part thereof, and the interest of such party; and the court wherein is pending such suit may make all such rules and orders as to such appearances and representations, the number of counsel, and all matters of procedure, and otherwise, as to subserve the ends of justice, and speed the determination of such suits: *Provided further*, That communities, associations, corporations, firms, and individuals who are interested in the controversy or question before the Interstate Commerce Commission, or in any suit which may be brought by anyone under

the provisions of the aforesaid sections relating to action of the Interstate Commerce Commission, may intervene in said suit or proceedings at any time after the institution thereof; and the Attorney General shall not dispose of or discontinue said suit or proceeding over the objection of such party or intervenor aforesaid, but said intervenor or intervenors may prosecute, defend, or continue said suit or proceeding unaffected by the action or nonaction of the Attorney General therein.

Complainants before the Interstate Commerce Commission interested in a case shall have the right to appear and be made parties to the case and be represented before the courts by counsel, under such regulations as are now permitted in similar circumstances under the rules and practices of equity courts of the United States. (Mar. 3, 1911, ch. 231, §§ 212, 213, 36 Stat. 1150, 1151; Oct. 22, 1913, ch. 32, 38 Stat. 220.)

§ 46. (*Judicial Code, section 208.*) *Suits to enjoin orders of the Interstate Commerce Commission to be against United States.*—Suits to enjoin, set aside, annul, or suspend any order of the Interstate Commerce Commission shall be brought in the district court against the United States. The pendency of such suit shall not of itself stay or suspend the operation of the order of the Interstate Commerce Commission; but the court, in its discretion, may restrain or suspend, in whole or in part, the operation of the commission's order pending the final hearing and determination of the suit. (Mar. 3, 1911, ch. 231, § 208, 36 Stat. 1149; Oct. 22, 1913, ch. 32, 38 Stat. 219.)

§ 47. *Injunctions as to orders of Interstate Commerce Commission; appeal to Supreme Court; time for taking.*—No interlocutory injunction suspending or restraining the enforcement, operation, or execution of, or setting aside, in whole or in part, any order made or entered by the Interstate Commerce Commission shall be issued or granted by any district court of the United States, or by any judge thereof, or by any circuit judge acting as district judge, unless the application for the same shall be presented to a circuit or district judge, and shall be heard and determined by three judges, of whom at least one shall be a circuit judge, and a majority of said three judges shall concur in granting such application. When such application as aforesaid is presented to a judge, he shall immediately call to his assistance to hear and determine the application two other judges. Said application shall not be heard or determined before at least five days' notice of the hearing has been given to the Interstate Commerce Commission, to the Attorney General of the United States, and to such other persons as may be defendants in the suit: *Provided*, That in cases where irreparable damage would otherwise ensue to the petitioner, a majority of said three judges concurring, may, on hearing, after not less than three days' notice to the Interstate Commerce Commission and the Attorney General, allow a temporary stay or suspension, in whole or in part, of the operation of the order of the Interstate Commerce Commission for not more than sixty days from the date of the order of said judges pending the application for the order or injunction, in which

case the said order shall contain a specific finding, based upon evidence submitted to the judges making the order and identified by reference thereto, that such irreparable damage would result to the petitioner and specifying the nature of the damage. The said judges may, at the time of hearing such application, upon a like finding, continue the temporary stay or suspension in whole or in part until decision upon the application. The hearing upon such application for an interlocutory injunction shall be given precedence and shall be in every way expedited and be assigned for hearing at the earliest practicable day after the expiration of the notice hereinbefore provided for. An appeal may be taken direct to the Supreme Court of the United States from the order granting or denying, after notice and hearing, an interlocutory injunction, in such case if such appeal be taken, within thirty days after the order, in respect to which the complaint is made, is granted or refused; and upon the final hearing of any suit brought to suspend or set aside, in whole or in part, any order of said commission the same requirement as to judges and the same procedure as to expedition and appeal shall apply. (Oct. 22, 1913, ch. 32, 38 Stat. 220.)

§ 48. (*Judicial Code, section 211.*) *Suits to be against United States; intervention by United States.*—All cases and proceedings specified in section 44 of this title shall be brought by or against the United States, and the United States may intervene in any case or proceeding whenever, though it has not been made a party, public interests are involved. (Mar. 3, 1911, ch.

231, § 211, 36 Stat. 1150; Oct. 22, 1913, ch. 32, 38 Stat. 219.)

The pertinent provisions of the Interstate Commerce Act, as amended, are as follows:

Section 1, Paragraph (5) (a) of Part I of the Interstate Commerce Act:

(5) (a) All charges made for any service rendered or to be rendered in the transportation of passengers or property, or in connection therewith, shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful. (49 U. S. C. 1 (5) (a).)

Section 1, Paragraph 6 of Part I of the Interstate Commerce Act:

(6) It is hereby made the duty of all common carriers subject to the provisions of this part to establish, observe, and enforce just and reasonable classifications of property for transportation, with reference to which rates, tariffs, regulations, or practices are or may be made or prescribed, and just and reasonable regulations and practices affecting classifications, rates, or tariffs, the issuance, form, and substance of tickets, receipts, and bills of lading, the manner and method of presenting, marking, packing, and delivering property for transportation, the facilities for transportation, the carrying of personal, sample, and excess baggage, and all other matters relating to or connected with the receiving, handling, transporting, storing, and delivery of property subject to the provisions of this part which may be necessary or proper to secure the safe and prompt

receipt, handling, transportation, and delivery of property subject to the provisions of this part upon just and reasonable terms, and every unjust and unreasonable classification, regulation, and practice is prohibited and declared to be unlawful. (49 U. S. C. 1 (6).)

Section 2 of Part I of the Interstate Commerce Act:

That if any common carrier subject to the provisions of this part shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property, subject to the provisions of this part, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful. (49 U. S. C. 2.)

Section 8 of Part F of the Interstate Commerce Act:

That in case any common carrier subject to the provisions of this part shall do, cause to be done, or permit to be done any act, matter, or thing in this part prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this part required to be done, such common carrier shall be liable to the person or per-

sons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this part, together with a reasonable counsel or attorney's fees, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case. (49 U. S. C. 8.)

Section 9 of Part I of the Interstate Commerce Act:

That any person or persons claiming to be damaged by any common carrier subject to the provisions of this part may either make complaint to the Commission as hereinafter provided for, or may bring suit in his or their own behalf for the recovery of the damages for which such common carrier may be liable under the provisions of this part, in any district or circuit court of the United States of competent jurisdiction; but such person or persons shall not have the right to pursue both of said remedies, and must in each case elect which one of the two methods of procedure herein provided for he or they will adopt. In any such action brought for the recovery of damages the court before which the same shall be pending may compel any director, officer, receiver, trustee, or agent of the corporation or company defendant in such suit to attend, appear, and testify in such case, and may compel the production of the books and papers of such corporation or company party to any such suit, the claim that any such testimony or evidence may tend to criminate the person giving such evidence shall not excuse such witness from testifying, but such evidence or testimony shall not be used against such person on the

trial of any criminal proceeding. (49 U. S. C. 9.)

Section 15, Paragraph (13) of Part I of the Interstate Commerce Act:

(13) If the owner of property transported under this part directly or indirectly renders any service connected with such transportation, or furnishes any instrumentality used therein, the charge and allowance therefor shall be published in tariffs or schedules filed in the manner provided in this part and shall be no more than is just and reasonable, and the Commission may, after hearing on a complaint or on its own initiative, determine what is a reasonable charge as the maximum to be paid by the carrier or carriers for the services so rendered or for the use of the instrumentality so furnished, and fix the same by appropriate order, which order shall have the same force and effect and be enforced in like manner as the orders above provided for under this section. (49 U. S. C. 15 (13).)

Section 15a, Paragraph (2) of Part I of the Interstate Commerce Act:

(2) In the exercise of its power to prescribe just and reasonable rates the Commission shall give due consideration, among other factors, to the effect of rates on the movement of traffic by the carrier or carriers for which the rates are prescribed; to the need, in the public interest, of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service; and to the need of revenues sufficient to enable the carriers, under honest,

economical, and efficient management to provide such service. (49 U. S. C. 15a.)

Section 17, Paragraph (9) of Part I of the Interstate Commerce Act:

(9) When an application for rehearing, reargument, or reconsideration of any decision, order ~~or~~ requirement of a division, an individual Commissioner, or a board with respect to any matter assigned or referred to him or it shall have been made and shall have been denied, or after rehearing, reargument, or reconsideration otherwise disposed of, by the Commission or an appellate division, a suit to enforce, enjoin, suspend, or set aside such decision, order, or requirement, in whole or in part, may be brought in a court of the United States under those provisions of law applicable in the case of suits to enforce, enjoin, suspend, or set aside orders of the Commission, but not otherwise. (49 U. S. C. 17 (9).)

